IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1099

BOB FRED ASHE, PETITIONER,

v.

HAROLD R. SWENSON, WARDEN MISSOURI STATE PENITENTIARY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX

Chronological List of Important Dates on Which Pleadings Were Filed, Hearings Held and Orders Entered

January 28, 1960, Sixth District Magistrate Court of Jackson County, Missouri, preliminary hearing, defendants Ashe, Larson, Johnson, and Brown bound over to the Circuit Court of Jackson County, Missouri for trial.

February 3, 1960, information against defendants Larson, Ashe and Johnson filed in Cause Nos. 29762, 29764, 29766, 29768, 29770, 29772, 29774, in the Circuit Court of Jackson County, Missouri.

February 4, 1960, defendant Ashe arraigned in Circuit Court of Jackson County, Missouri, enters plea of not guilty.

April 29, 1960, amended information filed against defendant Ashe alleging Habitual Criminal Act.

May 2, 1960, trial begins in Cause No. C-29766 in the Circuit Court of Jackson County, Missouri.

May 3, 1960, verdict finding defendant Ashe "not guilty due to insufficient evidence."

June 20, 1960, Cause No. C-29768 in the Circuit Court of Jackson County, Missouri, defendant Ashe files Motion to Dismiss Autrefois Acquit.

June 21, 1960, Cause No. C-29768 in the Circuit Court of Jackson County, Missouri, hearing on motion to dismiss. Motion overruled per opinion filed.

June 21, 1960, amended information filed against defendant Ashe alleging Habitual Criminal Act. Taking of testimony begins.

June 22, 1960, final day of trial in Cause No. C-29768 in the Circuit Court of Jackson County, Missouri, motion for directed verdict of acquittal at the close of the evidence denied, jury returns verdict finding defendant Ashe guilty of robbery, first degree.

July 19, 1960, defendant Ashe files motion for new trial.

October 10, 1960, defendant Ashe's motion for new trial overruled.

October 10, 1960, Cause No. C-29768 in the Circuit Court of Jackson County, Missouri, judgment entered and defendant Bob Fred Ashe, sentenced to imprisonment for 35 years.

October 17, 1960, Cause No. 29768 in the Circuit Court of Jackson County, Missouri, defendant Ashe files Notice of Appeal to the Supreme Court of Missouri.

November 13, 1961, Cause No. 48539 in the Supreme Court of Missouri, opinion filed affirming judgment of Circuit Court of Jackson County, Missouri.

October 4, 1965, Cause No. C-29768 in the Circuit Court of Jackson County, Missouri defendant Ashe files motion to vacate sentence under Missouri Supreme Court Rule 27.26.

October 8, 1965, defendant Ashe's motion to vacate sentence denied without hearing.

June 13, 1966, Cause No. 51,798 in the Supreme Court of Missouri, opinion affirming judgment of Circuit Court which denied motion to vacate sentence.

July 27, 1966, petition for Writ of Habeas Corpus, Cause No. 1112, filed in the United States District Court for the Western District of Missouri, Central Division.

September 13, 1966, order to show cause issued to determine necessity for evidentiary hearing.

October 10, 1966, order announcing that no evidentiary hearing is necessary and providing for agreed stipulation of facts.

October 28, 1966, stipulation filed.

December 9, 1966, petitioner Ashe's brief filed.

July 27, 1967, Cause No. 1112, memorandum and order denying petition for Writ of Habeas Corpus issued by the United States District Court for the Western District of Missouri, Central Division.

August 14, 1967, Certificate of Probable Cause issued by the United States District Court for the Western District of Missouri, Central Division. Notice of Appeal filed.

September 18, 1967, appeal docketed in the United States Court of Appeals for the Eighth Circuit, Cause No. 19013, styled Ashe v. Swenson.

April 2, 1968, argument before the United States Court of Appeals for the Eighth Circuit.

July 30, 1968, opinion and judgment by the United States Court of Appeals for the Eighth Circuit affirming denial of petition for Writ of Habeas Corpus.

August 15, 1968, Cause No. 19013, order staying issuance of mandate pending petition to the Supreme Court of the

United States issued by the United States Court of Appeals for the Eighth Circuit.

August 17, 1968, petitioner files motion for leave to proceed in forma pauperis and petition for Writ of Certiorari.

March 3, 1969, Supreme Court of the United States, order granting motion for leave to proceed in forma pauperis and granting petition for Writ of Certiorari.

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1 IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

No. C-29766

STATE OF MISSOURI, *Plaintiff*,
v.
BOB FRED ASHE, alias BOBBY FRED ASHE, *Defendant*.

Now on this day comes the Prosecuting Attorney and in open Court files the following Informations, to wit:

• • • •

C-29766 State of Missouri vs. Bobby Fred Ashe and Eric Lafe Larson and John Edward Johnson—Robbery, First Degree.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, January Term, 1960, in Division No. 3; Thereof, designated by the Rules of said Court as Criminal Division A. State of Missouri vs. Bobby Fred Ashe and Eric Lafe Larson and John Edward Johnson.

Information—Filed February 3, 1960

Now comes Sam Modica, Assistant Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon his oath informs the Court, that Bobby Fred Ashe and Eric Lafe Larson and John Edward Johnson whose Christian name in full unknown to
2 said Assistant Prosecuting Attorney on the 10th day of January, 1960, at the County of Jackson and State of Missouri, with force and arms, in and upon one Don Knight unlawfully and feloniously did make an assault with a dangerous and deadly weapon, to wit: a revolver loaded with gunpowder and leaden balls, and one (1) Swiss stainless steel wrist watch, Lawful money of the United States,

of the aggregate value of One Hundred ($100.00) Dollars, the money, goods, chattels and personal property of the said Don Knight from the person and in the presence and against the will of the said Don Knight then and there by force and violence to the person of the said Don Knight and by putting the said Don Knight in fear of an immediate injury to his person, feloniously did rob, steal, take and carry away; against the peace and dignity of the State.

(Signed) SAM MODICA
Assistant Prosecuting Attorney

3 (Reverse Side)

No. C-29766

Information

State of Missouri against Bobby Fred Ashe and Eric Lafe Larson, and John Edward Johnson Charged with Robbery, First Degree, Filed Feb. 3, 1960, John J. McFadden by Charles Modica, D.C.

WITNESSES: John & Viola Gladson, 307 E. Orchard, Lee's Summit
Jerry W. Freeman, 10-E Highway, Rt. 2 Box 182A
Orville Goodwin, 4 West Forest, Lee's Summit
Charles Westerfield (guard) Unity Village, Highway 40, Lee's Summit.
Arthur Graham, 14721 Fuller, Grandview, Mo.
Robert Bretz, Hgwy 71, South, Harrisonville, Mo.
Sgt. James Browning, 2719 Whitney Rd., Indep, Mo.
Off. Charles Gardner, Lee's Summit, Mo.
Lt. C. W. Keith, 412 Indep. Ave., Lee's Summit.
Donald Knight, 5th & Grand, Lee's Summit, Mo.
Richard McClenden, L-19 Lake View, Lee's Summit
Ray Roberts, Rt. 4, Lee's Summit, Mo.
Tpr. T. Ferguson, 5013 E. Third, Lee's Summit
Sgt. M. B. Roberts, 12530 Grandview Rd., Grandview, Mo.
D/S Claude Grantham, Greenwood, Mo.
S/S Robert Copeland, Greenwood, Mo.
Lt. Harry Nesbitt, Sheriff's Patrol
Tpr. D. E. Millsap, 5th & Grand, Lee's Summit
Sgt. E. A. Butler, 1009 W. First, Lee's Summit
4 Sgt. Carl Foster, 2903 Overton, Indep. Mo.

Amended H.C.A. Information—Filed April 29, 1960

STATE OF MISSOURI vs. Bob Fred Ashe, alias Bobby Fred Ashe. In the Circuit Court of Jackson County, Missouri, at Kansas City, March Term, 1960. In Division Number 3 thereof, designated by the rules of said Court as Criminal Division A.

Now comes Theodore J. Furry, Assistant Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon his oath informs the Court that Bob Fred Ashe, alias Bobby Fred Ashe whose Christian name in full is unknown to said Assistant Prosecuting Attorney, late of the county aforesaid on the 18th day of August, 1950 in the District Court of the United States for the Western District of Missouri, Western Division, the defendant Bob Fred Ashe, alias Bobby Fred Ashe, was convicted upon his plea of guilty to a violation of Section 659, Title 18, U.S.C., the offense of theft from an interstate shipment and sentenced to a term of two (2) years imprisonment, and that on the 4th day of December, 1952, defendant Bob Fred Ashe, alias Bobby Fred Ashe, was in the Circuit Court of Jackson County, in the State of Missouri, found guilty of the crimes of Burglary 2nd Degree and Tampering wtih a Motor Vehicle and was sentenced to a term of imprisonment of two (2) years on each of the two charges, said terms of imprisonment to run concurrently; that thereafter the defendant was received at the Missouri State Penitentiary on January 12, 1953, and was incarcerated therein until he was discharged by commutation of sentence on March 12, 1954, that thereafter, on the 10th day of January, 1960, at the County of Jackson and State of Missouri, with force and arms in and upon one Don Knight the said Bob Fred Ashe, alias Bobby Fred Ashe, unlawfully and feloniously did make an assault with a dangerous and deadly weapon, to wit: a revolver loaded with gunpowder and leaden balls, and one (1) swiss stainless steel wristwatch and lawful money of the United States of the aggregate value of Four Hundred and no/100 ($400.00) Dollars; the money, goods and chattels and personal property of the said Don Knight, from the person and in presence and against the will of the said Don Knight then and there by force and violence to his person and by putting the said Don Knight in fear of an immediate injury to his person, feloniously did rob,

steal, take and carry away, against the peace and dignity of the State.

(Signed) THEODORE J. FURRY
Assistant Prosecuting Attorney

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6 (Reverse Side)

No. C-29766

Amended H.C.A. Information

STATE OF MISSOURI against Bob Fred Ashe, alias Bobby Fred Ashe Charged with ROBBERY, 1st Degree, H.C.A. Filed April 29, 1960 John J. McFadden, Clerk. By D.C.

WITNESSES:
John & Viola Gladson, 307 E. Orchard, Lee's Summit
Jerry W. Freeman, 10 E. Highway, Rt. 2 Box 182A
Orville Goodwin, 4 West Forest, Lee's Summit
Donald Knight, 5th & Grant, Lee's Summit
Richard McClenden, L 19 Lake View Lee's Summit, Mo.
Ray Roberts, Rt. 4, Lee's Summit, Mo.
Charles Westerfield (guard) Unity Village, Highway 50, Lee's Summit, Mo.
Trooper D. P. Buehler, Troop A, Mo. Highway, Lee's Summit, Mo.
Otto Ray, Deputy Sheriff, Jackson County Court House, Kansas City, Missouri
7 Arthur Graham, 14721 Fuller, Grandview, Mo.
Tpr. T. Ferguson, 5013 E. Third, Lee's Summit.
Sgt. M. B. Roberts, 12530 Grandview Rd., Grandview, Mo.
Lt. Harry Nesbitt, Sheriff's Patrol
Tpr. D. E. Millsap, 5th & Grand, Lee's Summit
Sgt. E. A. Butler, 1009 W. First, Lee's Summit
Sgt. Carl Foster, 2903 Overton, Indep., Mo.
Off. Charles Gardner, Lee's Summit, Mo.
Leo Burrows, c/o Burrows Garage, Lee's Summit, Mo.
A. C. Murphy, Lizzy Ann Trailer Court, Belton, Mo.
Trp. R. G. Place, Mo. Highway Patrol, Trp. A. Lee's Summit, Mo.
Leon Hines, K. C. Mo. Lab.
Joe Murphy, Chief Draftsman, Office, Cty Hwy. Engineer, Jackson County Court House.

[File Endorsement Omitted]

Transcript of Trial—May 2, 1960

8 BE IT REMEMBERED that heretofore on Monday, May 2, 1960, this cause came on regularly for trial before the Honorable J. Marcus Kirtley, Judge of Division No. Three, designated as Criminal Division A of the Circuit Court of Jackson County, Missouri, and a jury.

Mr. Theodore J. Furry, Assistant Prosecuting Attorney for Jackson County, appeared for the Plaintiff.

The Defendant appeared in person and by his counsel, Mr. William H. Costello and Mr. John C. Pohlmann.

(Whereupon, a jury was duly empaneled, selected and sworn to try this cause.)

* * * * * * * * * *

(Thereafter, counsel for the State made his opening statement to the jury.)

(Counsel for the defendant reserved his opening statement.)

* * * * * * * * * *

Whereupon, the following proceedings were had and entered of record, to wit:

9 STATE'S EVIDENCE

WHEREUPON, the plaintiff, State of Missouri, to sustain the issues in its behalf, offered testimony, both oral and documentary, as follows:

John Gladson,

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. John Gladson, 500 Browning.

Q. Mr. Gladson, it is a little difficult at times to hear in here. I want you to speak out, please, so everybody on the jury can hear you. A. Yes, sir. You want my address?

Q. Yes. A. 500 Browning, Lee's Summit, Missouri.

Q. And what is your occupation? A. Barber.

Q. You are presently actively so engaged? A. Yes, sir.

Q. How long has it been since you have been actively so engaged? A. It will be two years in August.

10 Q. Where were you living on the morning of January 10? A. 307 East Orchard, Lee's Summit.

Q. That is Lee's Summit, Missouri? A. Right.

Q. Is that in Jackson County, Missouri? A. Yes.

Q. All right. Now, the evening of January 9 and the morning of the 10th did you have a card game at your home? A. I did.

Q. What time did this game start? A. 9:30 or 10:00,—I don't know—around that I would say.

Q. Did you have participants in the game that evening? A. Yes, sir.

Q. Will you name all the people that were there? A. Don Knight, and Ray Roberts, Jerry Freeman, and Richard McClendon—let's see—myself, and Orville Goodwin.

Q. I see. Was anybody else in the home that evening? A. Just my wife.

Q. And what time did she retire, if you know, that evening? A. Well, she didn't feel good. It was around 11:30 or 12:00 o'clock.

Q. And did she come downstairs? A. Yes, sir.

Q. What happened? A. She just brought some

11 sandwiches down and made some coffee, and said she was going to bed, she didn't feel good.

Q. And she went on back upstairs, is that right? A. Yes, sir.

Q. How long have you been playing this game with these men? A. It started sometime ago. I mean we were at the V.F.W. Hall in Lee's Summit, but recently, I mean a few times we played at my house, possibly ten times, maybe twelve. I don't know exactly.

Q. All right. Now, do you suffer from any physical disability? A. Heart trouble, yes.

Q. How long have you had that? A. It will be two years the first of August.

Q. All right. Now, did anything unusual happen that morning of January 10? A. Well, just somebody—

Q. I mean did anything disturb the party? A. In the beginning I heard somebody upstairs. I asked somebody to go upstairs to see who it might be. The door was not

locked, and I mean upstairs or downstairs either. So I asked somebody else to go because I didn't want to walk up the steps, and just as they started up the stairs they kicked the door in and said this was a holdup.

12 Q. Who started up the steps? A. Don Knight.

Q. Tell the Court and jury what happened when the man kicked the door. What did you see? What did you hear? A. They said it was a stick-up, and three men entered and started down, and two of them had red bandannas on their face and one had a white hood, like a scarf or something.

Q. Where were the bandannas and the scarf? A. Around here (indicating).

Q. Below the eyes and around the head, is that right? A. Yes, sir.

Q. How were they dressed? A. Well, just every kind of way, you might say. I mean there wasn't any of them really dressed up. I would say it looked like clothes somebody might have picked up to put on, to my knowledge.

Q. Just tell the Court and jury what was said and what was done from the point, from the time these men came into the basement. A. Well, they said this was a stick-up, and they came over there around, and took everybody over on the other side of the basement, which was the darker side. There was only just a small light on that side of the basement.

Q. Which side was that? A. That would be on the south side.

13 Q. The south side of the basement, that is? A. Yes, sir.

Q. That is where the others were taken? A. Yes.

Q. Were you taken over? A. I told the first man, I said, "I have heart trouble". He said, "I know it". I said, "Don't bother me; leave me alone. Do whatever you want, and get going". And then—they took the rest of them over there and put them in a circle and tied them up; and I went over and sat down on a lawn chair which was down in the basement. Some one of them got mean and made me get in the circle. I told him not to tie me up at this time, and he didn't either. I told him I couldn't stand pressure around my waist. And then about that time somebody came down shaking some keys around, wondering whose car they belonged to, and nobody knew actually, I

didn't know, I mean, the keys, they belonged to. The man had two sets of keys, and one extra set, and he forgot about having them. So then they said, "Well, we ought to blast into them, maybe we can find out then who these keys belong to.

Q. Do you remember which one said "Let's blast into them"? A. To my knowledge, it would be Brown. That would be the one, the one that had the shotgun.

Q. All right. Did you get a look at the man carrying the shotgun down there? A. Yes, sir.

14 Q. What happened? How were you able to get a look at him? A. His mask fell down. He never went to the trouble to put it back up. And he also said, "Well, this ought to be good for a couple of thousand dollars", you know, like that, and then they left.

Q. I see. The men did leave? A. Yes.

Q. Now, did you have some property taken from you? A. I had a diamond ring and my wallet and $10.00 in cash.

Q. What happened after the men left? A. Well, I went upstairs, and so Ray Roberts and Richard McClenden went out to the Highway Patrol Station to turn it in, because they had cut both of the phones or jerked them loose, or what not.

Q. Where were the phones? A. One in the kitchen and bedroom and dining room together.

Q. Was there something about the trousers— A. They took everybody's trousers except mine and Orville Goodwin's; but they took my pocketbook out of my pocket before and my ring before they ever began to take the trousers.

Q. They searched through your pockets? A. Just jerks them out.

Q. Did you later—have you since seen any of the men that were involved? A. I saw them that day at the Highway Patrol.

15 Q. You were able—you said you did identify Brown? A. That is right.

Q. Did you see him out at Patrol Headquarters that morning? A. Yes, sir.

Q. Were you able to identify any of the other men involved?

Mr. Costello: I object to that as incompetent evidence,

and immaterial, something that occurred after the end of the conspiracy and should be limited.

The Court: Overruled.

Mr. Costello: Exception.

Q. (By Mr. Furry) Did you ever at any time after the time you were actually down there and the property was taken from you and these other men ever see any of the other men other than Brown? A. Well, I saw four of them out there at the Station, but I mean as far as being positive on every one or which one I couldn't be exactly.

Q. You made no identification of the others? A. Not positive, no.

Q. Did you make any identification by any other method? A. Well, of course, being a barber, I don't know, you have an instinct, kind of look at people's hair or hairline. I don't know, it is just something that kind of goes along with the business. You look first and look at the hair, I don't know. On this one with the mask, between
16 the cap and the mask I could see what I thought looked like gray hair, but it could have been blond.

Q. Light colored hair? A. That is right.

Mr. Furry: Would you mark these, please?

(Thereupon, State's Exhibits 1, 2, 3 and 4 were marked for identification).

Q. By the way, did you see your wife after you came out of the basement that morning? A. Yes, sir.

Q. What was her condition when you got up there? A. Well, I didn't get up there first.

Q. I see. A. And somebody else had already untied her when I first saw her.

Q. I see. All right. By the way, what is her physical condition today? A. She is sick.

Mr. Costello: I object to that as being immaterial, Your Honor, and incompetent.

Mr. Furry: I am entitled to show why she can not be here.

The Court: Overruled.

A. Well, she had the flu, and the doctor told her—
17 Q. Where is she now? A. She is in bed.

Q. All right. Mr. Gladson, I hand you what has been marked as State's Exhibit 1 for identification, and

ask you if you can identify that for us? A. That is my pocketbook.

Q. Now, is that the pocketbook you told us about that was taken? A. Yes, sir.

Q. What is this writing on the other side of it? A. That is my son's handwriting, "Made of pure gold".

Q. Is this the condition it was in that night when it was taken? A. Yes, sir.

Mr. Furry: At this time I offer into evidence State's Exhibit No. 1.

(Thereupon, the following proceedings were had in the presence but OUT OF THE HEARING OF THE JURY:)

Mr. Costello: I object to this as being incompetent and immaterial for the reason there has been no identification by this witness, no definite identification of any exhibit, so forth, and tends to prove another crime for which the defendant is not on trial. Now, this defendant is charged with robbing this particular individual.

The Court: You are proposing to show, for the record, the connection between this defendant and the exhibit being offered?

18 Mr. Furry: Yes, sir. It is my proposal to show in each exhibit the connection between the defendant and his colleagues in this crime. This is one of the main facts and circumstances, which, I believe, are material and relevant to the guilt or innocence of this man. After all, that was an object taken at the game.

The Court: Don't put this on the record.

(Thereupon, colloquy was had off the record).

The Court: The Court has tried a companion case to this case last week, and I have been advised by the prosecutor and defense counsel that all the evidence in this case is substantially the same as in the other case that was tried, and it is the State's theory, as I understand, that this holdup occurred and was perpetrated by this defendant and three co-defendants, one named Johnson, one named Brown, and one Larson, and at the time of the alleged robbery there were six men participating in the poker game, all of whom were robbed along with Gladson, presently on the witness stand. The State elected to file

charges of first degree robbery against this defendant and the other three are charged with perpetrating a holdup. There is a case pending against each of the four defendants alleging the robbery of each of the participants in the poker game, along with the charge against some of them for stealing a motor vehicle. The instant case is against the defendant Ashe, wherein he is charged with first degree robbery against one Don Knight. My understanding is, it is the State's position that the holdup was a joint act of the four defendants named, that a lot of circumstantial evidence will be offered, no doubt, which concerns the disposition of the car, the finding of certain property that was taken in the holdup, of which State's Exhibit 1 is one piece of evidence, the apprehension, the flight of the various defendants, and their apprehension in the near proximity of where the cars were abandoned, and so forth. It is the opinion of the Court that the authority of State vs. Johnson, 286 Southwest 2nd—

Mr. Furry: Page 787, I believe.

The Court: —787, all of the evidence, the acts of this defendant and his co-conspirators from the time of the commencement of the robbery until their apprehension on such occasion is proper and competent evidence in this case, and for that reason the objection of the defendant to State's Exhibit No. 1 is overruled. The Court will make consistent ruling without further objection from defense counsel if you so want it.

Mr. Costello: Yes, Your Honor. Exception saved.

(Thereupon, the following proceedings were had IN THE PRESENCE AND HEARING OF THE JURY:)

Mr. Furry: State's Exhibit 1 is received then, is that correct?

The Court: Correct.

Q. (By Mr. Furry) Mr. Gladson, I hand you what has been marked as State's Exhibit No. 2, and referring only to the item will you state what that is? A. Yes, that is my ring.

The Court: I can't hear you.

A. It is my ring, sir.

The Court: All right.

Q. And that was the ring you told us about that was taken that evening? A. Yes, sir.

Mr. Furry: I offer into evidence State's Exhibit 2.

Mr. Costello: That exhibit is only the ring.

Mr. Furry: Just the ring, at this time.

Q. Mr. Gladson, I hand you what has been marked State's Exhibits 3 and 4 for identification, and ask you to identify those. A. Well, this was—

The Court: When you say this was, that is a white telephone that was marked—

21 The Witness: It is my phone.

The Court: —State's Exhibit 2.

The Witness: I believe they can see I have a phone.

The Court: All right. I will go along with you.

A. I know this was done here with a frying pan or something was set too close and it cut it. That was in the dining room.

Q. The telephone number on that is— A. Broadway 5554. My telephone.

Q. I hand you what has been marked State's Exhibit 4, a black telephone. Is that— A. That is the one that was in the bedroom.

Mr. Furry: Fine. Thank you.

I offer State's Exhibits 3 and 4.

Mr. Costello: No objection.

Mr. Furry: I believe that is all.

Mr. Costello: Your Honor, we are going to move the Court to strike all the witness' testimony for the reason that it is incompetent, irrelevant and immaterial to any issue, and doesn't identify or place the man in the robbery or any participants.

The Court: Overruled.

Mr. Costello: Exception.

22 Cross Examination

By Mr. Costello:

Q. What was that new address? A. 500 Browning, Lee's Summit, Missouri.

Q. Lee's Summit Road? A. Lee's Summit, Missouri.

Q. How long have you been out at Lee's Summit, Mr. Gladson, had your shop out there? A. Thirty-three years in December, last December, that is.

Q. Were you engaged in this game? Were you playing? A. Yes, sir.

Q. Were you making any of these $100.00 bets? A. No, I don't think so.

Q. Were there some bets of this size made? A. $100.00?

Q. Raises. A. I don't recall, I mean, anything particularly about what come up in this particular pertaining to the game at all.

Q. Do you know how much money was in the game at the time of this holdup? A. Not exactly, no.

Q. Can you give us any idea of the denominations of the bills? A. Well, I think there was probably ones, fives, tens and maybe twenties. I don't know—maybe—

Q. You still have your shop at Lee's Summit? A. Yes, sir.

Mr. Costello: That is all.

23 Mr. Furry: Thank you, sir.

Your Honor, the witness would like to be excused.

The Court: Mr. Costello, is it all right for this witness to be excused?

Mr. Costello: Yes, Your Honor.

The Court: He is excused.

Let's take the afternoon recess.

RECESS

THEREUPON, at the conclusion of the recess, the following further proceedings were had:

Donald Knight,

being duly sworn, testified as follow:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. Donald Knight, 300 East 5th Street, Lee's Summit.

Q. What is your occupation? A. Druggist.

Q. Do you have your own store? A. Yes, sir.

Q. Where is that located? A. 247 South Main, Lee's Summit.

Q. Did you have occasion to be in the Gladson home on the evening of January 9, this year? A. January 10.

24 Q. What time did you get there? A. I got there about 10:00 o'clock, after I bowled; a little after 10:00, about 10:15.

Q. What night of the week was it? A. It was a Saturday night.

Q. All right. What was the reason for going and what happened? A. We was playing cards, and—

The Court: Mr. Knight—

The Witness: Sir?

The Court: If you will keep your hand down,—

The Witness: Yes, sir.

The Court: —we can hear better.

The Witness: Yes, sir.

A. We were playing cards. There were four men which got there, Roberts, Gladson, Goodwin, and a boy by the name of Jerry Freeman.

Q. All right. After you got there did you join the game? A. Yes, sir.

Q. And did another man join the game later on? A. Yes.

Q. Who was that? A. It—Richard McClendon, Richard, I guess the name is.

Q. What time did he get there? A. He got there a little after 11:00, I guess it was, or maybe later.

25 Q. All right, and what happened that evening, that morning? A. During that night?

Q. Yes. A. Well, it was the next morning.

Q. What time was that? A. I expect it was around 3:00 o'clock or after.

Q. What happened? A. I heard somebody walking upstairs. It didn't sound like Mrs. Gladson. It sounded heavier, like a man, and I told, I said, "There is somebody upstairs, walking around". I said—Ray Roberts was sitting together at that time, and he was standing up, and I walked over to the door of the basement,—it was in the southeast corner of the basement, come down from up in the garage part, where the garage is right up, jammed up against the house—and pulled the door open. It has a latch on it. I pulled it up. There was—I saw two men with red bandannas on, and one had a shotgun. He was in front, and the other man had a shiny pistol. And I slammed the door shut, and put my shoulder against it, and he kicked with his feet and slammed me against the wall, and pushed me against it, with my face to the wall and hands on the wall.

Q. All right. What happened after that? A. They was kind of milling around and snatching up the money
26 off of the table. There was three of them. The one with a gun I didn't get a good look at, and all I could see was a dark gun.

Q. Did you have some money? A. Yes, sir.

Q. How much? A. I had something like $250.00 in cash, and probably three, four and seven hundred in checks. $20.00 and $50.00 and $100.00 checks.

Q. All right. Was this property taken? A. I recovered one of the $100.00 checks and $20.00 check was left laying on the floor—took the rest. Took my watch, started to take my ring, started to pull it, and I told them to look at the Masonic emblem all over it, that it wouldn't do them any good. So they left it alone, and took my watch and later got my billfold with my pants—nothing in the billfold except cards.

Q. Where was your money at the time it was taken? A. It was on the table.

Q. After you were put over against the wall, how were you placed against the wall, in what position? A. With my hands against the wall, facing the wall.

Q. Facing the wall? A. Yes, sir.

Q. What happened to the other men? A. They pushed them around, a lot of milling around. One of them—they got them over in the corner—it wasn't in the corner,
27 but darn near—and made them stand in a circle, and started to tie them up, and I had to stand— It is so darn confusing that it is hard to remember just exactly how it was, and them showing those guns in our faces.

Q. After you were in that circle were you down on the floor? A. They then made us get up and take our pants off.

Q. And then what happened? A. Well, they stood us up and pulled down a clothesline that was in the basement and tied us up with the exception of Gladson. They didn't tie Gladson up. There was five of us they tied up, and then was gone a little while and came back, checking, and there was some mention about what car is that—

Q. You say they were gone? A. They all went up the steps, three of them. They ran. Three went up.

Q. How many came down? A. Seems to me there was four.

Q. Now, they were looking for some keys? A. Yes, sir.

Q. Tell us what conversation there was about the keys. A. They wanted to know which one had a car key and what car, and finally ended up on Robert's key and used his car. His car was gone anyway when we come upstairs.

28 Q. They left? A. Then they left, and I heard a car start. I was the first one upstairs. The rope wasn't tight, and I kind of held my arms up so it wouldn't be too tight, and when the rope slipped down I got out, and went upstairs, and I didn't see Vi and I didn't hear anyone, and then I heard Vi begin mumbling and she said, "In here. I am tied—"

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A. I went in the bedroom.

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A. She was covered over with a quilt and bedspread, and she was all covered up. I jerked the covers off, and she was laying on her stomach with her hands tied behind her and her feet tied together, and I pulled on her hand and she was tied fairly tight.

Q. What was she tied with? A. The cords off of two telephones, one key strength cord and the other one was a regular phone. I untied her and asked if John had any pants up there—

Q. You did have a conversation? A. —which was in the closet at the foot of the bed, and I grabbed an arm
29 load of pants, picked out the biggest pair for myself and threw the rest down to the boys.

Q. What did you do after you got your britches on then? A. Out in front, looking around to see what had happened. Ray's car was gone.

Q. Who is Ray? A. Ray Roberts.

Q. What did you do after that? Did you look around? Did you find anything else? A. I found my keys laying there and a tire they laid out of his car, his spare tire, and I found several things around there and down the road a way. One thing they had was a rule, and I found another bunch of keys I found out later somebody down the street had dropped, and they didn't belong with the outfit.

Q. Did you notice what type of shotgun the man had in his hand when you opened that door? A. Well, it was a

single-barrel, and I found it was a 14 or 12-gauge and the barrel was black.

Mr. Furry: (To the reporter) Will you mark this please?

(Thereupon, State's Exhibit No. 5 was marked for identification).

Q. Would you take a look at this shotgun, which has been marked State's Exhibit 5? Can you identify that?

30 A. I can identify it as being the single-barrel and being a black barrel. I presume it is a 12-gauge.

Q. Is that similar to the gun you saw there that evening? A. Very similar.

Mr. Costello: Are you offering—

Mr. Furry: I am not going to offer anything that has not been sufficiently identified.

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Q. (By Mr. Furry) Sir, you have described for us—

31 You said there were two men with pistols? A. I wasn't sure the third man had a gun. I wasn't sure. It could have been a piece of—light-colored and black lock. It was shiny and I thought at first it was a cap-gun, you know, the kind kids play with, but when he got closer I saw it was the real thing.

Q. Describe what you saw, the light-colored pistol. A. Well, it had a barrel, probably four or five or six inch lock, and a small bore.

Q. What was the color of the barrel? A. The barrel was nickel-plated or shiny.

Q. Did you see the handle? A. No, sir, I didn't see the handle.

(Thereupon, State's Exhibit No. 6 was marked for identification).

Q. Mr. Knight, I hand you what has been marked State's Exhibit 6, and ask you to take a look at that and tell us what it is, if you can? A. It is a billfold they took out of my pants the night of the robbery.

Q. Was that returned to you? A. It was returned to my store by a Lee's Summit policeman.

Q. And about when was that? A. Oh, possibly three weeks after the robbery. It had laid out. It had laid out through two snows and two rains probably.

Q. How did it look? A. It was sopping wet.

Mr. Furry: I offer in evidence State's Exhibit 6.

Mr. Costello: No objection.

(Thereupon, State's Exhibits 7 and 8 were marked for identification).

Q. Mr. Knight, I hand you what has been marked State's Exhibits 7 and 8, and ask you if you can identify those? A. This one was the—

Mr. Court: Which one is this? What is the number?

Mr. Furry: State's Exhibit No. 7.

A. Number 7 is the bill with a V-shaped torn piece in it. That is one that I called my lucky dollar bill. I kept it in the bottom of my stack, and when I felt like I was going to win a pot I threw that in, and most of the time they didn't call me.

Q. Can you tell what this mark is here on the dollar bill, sir? A. That is my initial, "D.K."

Q. When were they placed there? A. They were placed there in the sheriff's office in Independence on about the 12th or 13th of January.

Q. State's Exhibit 8, will you take a look at that, please? A. Well, there was a dollar bill that was in the pot with a lot of this cellophane. I am not positive, but usually in a poker game they get torn up and wrinkled up, and it
33 was in practically every pot. But I am not positive.

Q. The initials that appear on the back of that— A. That is my initials.

Q. Were they placed on that statement at the same time they were on this other exhibit? A. That is right.

Mr. Furry: I offer in evidence State's Exhibits 7 and 8.

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Mr. Furry: I believe that is all.

Cross Examination

By Mr. Costello:

Q. Mr. Knight, do you know how many men participated in this holdup? A. Three.

Q. That was all that you saw that you are sure of, three men? A. That is right.

Q. And you did not identify any one as being a
34 participant in the holdup? A. Well, not absolutely, no, because I never did get a good look at them.

Q. And on this currency that you had, I believe you said $2200.00 or $2250.00, what denominations was that money in? A. Well, I expect the biggest bill was possibly a twenty. I don't remember of any—I can't remember, but there was tens and twenties and fives and ones—quite a few ones.

Q. Do you know which denomination you had the largest number of? A. No, I can't answer that unless it would be ones. I did have quite a few ones.

Q. How many ones? A. Not very many.

Q. Do you know how many tens?

The Court: You will have to answer. We can't put down those—

A. I judge—I didn't check it. I don't know. I know there was not too darned many.

The Court: We can't put your nods in the record. You have to say something.

A. Oh, they was possibly four or five twenties and a couple or three tens and a few fives and quite a few ones.

Q. Can you give us any idea how many twenties were in in this game? A. I can't.

35 Q. How about tens? A. Tens?

Q. Yes. A. I can't do that.

Q. Now, these checks you speak of, whose checks were they that you had there in front of you? A. Well, most of them were signed by Jerry Freeman.

Q. Was he a frequent player in this game? A. Not too much.

Q. In fact, I think you once described him as a new man in the game, didn't you? A. That is right. He probably played with us three or four times before this game. We had been playing since 1946.

Q. A bunch of fellows out there that were in business? A. No. Mostly V.F.W., Veterans of Foreign Wars.

Q. I mean men in Lee's Summit? A. Yes. All except one who lived in Raytown. He was not there.

Q. You handle a good many one dollar bills I expect in your Drug Store, do you not, over the years? A. Quite a few, yes, sir.

Q. And is it uncommon to see one that is torn? A. Well, I don't see too many, no, sir.

Q. You see some? A. See quite a few that is stuck together with cellophane tape. See lots of those.

Q. You see some with nicks, little nicks torn in
36 them, and so forth, do you not? A. Not too much. Most of the time you get any bills they are patched.

Q. Did you take this Exhibit 7, that is the one dollar bill with the notch, did you take that to the game with you? A. No, sir.

Q. Where was it? A. I got it in the first pot.

Mr. Costello: That is all, Mr. Knight.

Redirect Examination

By Mr. Furry:

Q. About how much money was in that game in the way of currency? A. It don't seem to me like much more than $800.00 or $900.00. Might have been more, might have been less, but quite a number of checks. Some of these were pay checks. Seems to me there was one in there from the Chevrolet plant, and then, one was—well, I can't remember what it was. They wasn't on this Freeman.

Mr. Furry: That is all. Thank you very much.

Mr. Costello: That is all.

(Witness excused).

37 **Richard McClendon,**

being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. Richard McClendon, 119 Lake View, Lee's Summit, Missouri.

Q. What is your occupation? A. I operate a tavern and cafe.

Q. And where is that located? A. It is located on the highway just east of Lee's Summit.

Q. Did you have occasion to be in Don Gladson's home on the morning of January 10? A. Yes, sir.

Q. What time did you get there? A. At approximately around 2:30 in the morning when I got there.

Q. What was the occasion for your being there at that hour? A. I had received a phone call earlier in the evening from Mr. Gladson informing me that some of the boys was going to be over for a card game and invited me over if I cared to come.

Q. Were you working that evening? A. Yes, sir. I operated my business until 1:30 in the morning.

Q. And after you closed your business you went
38 over to the Gladson's home, is that right? A. Yes, sir.

Q. All right. Now, just tell us what you did when you got over there? A. Well, after I closed I went over there, and there was five fellows there playing cards, and I joined them.

Q. Did anything unusual happen that morning? A. Well, along about four o'clock Mr. Gladson made a remark about some noise he heard upstairs like somebody walking, and he made the remark it couldn't be Vi, his wife, because she wouldn't have shoes on and wouldn't be making that much noise, and asked one of the fellows that was playing to investigate, to go up and investigate.

Q. All right. Did somebody start toward the door? A. Well, yes. Mr. Roberts is the one he asked to go up, and he was involved in the game at that time and didn't go immediately. So he asked Mr. Knight if he would go look.

Q. What did Mr. Knight do? A. Well, Mr. Knight went over to the basement entrance which has a chain lock on it that allows it to open four or five inches, something like that, and he started to open the door, and somebody stuck a shotgun through this opening, and he made an attempt to hold the door, and they shoved it open and entered the basement and announced that it was a stickup.

39 Q. All right. Now, from where you were sitting —as you were sitting there I assume you were sitting around the circle? A. Yes, sir.

Q. You were playing cards around the table there in the basement? A. Yes, sir.

Q. What direction as you were stitting there were you looking toward? A. Well, I heard this commotion, naturally I was looking at the basement entrance.

Q. What happened after Mr. Knight was thrown back against the wall? A. Well, there was three guys entered

the basement and came over to the table where we were playing cards, at least one of them did, and had us all to get up away from the table and started picking up money off the table, and one of them made a remark that, well, there should be around Two Grand, or something like that.

Q. Which man was that? A. I am not positive which one it was.

Q. Did you have any money there? A. Yes.

Q. What happened to it? A. What money I had I picked it up when I got up from the table and tossed it on the floor there by the wastebasket.

40 Q. And then what happened after you got up from the table? A. They herded us all over to the wall, and had us put our hands up on the wall and removed our watches and rings and billfolds.

Q. All right, sir. Then what happened? A. And then they had us to remove our trousers.

Q. All right. A. And then they herded us all over kind of in the middle of the basement and they tied up one of the fellows that was playing. First, one made a remark, said "Let's tie them up", and jerked down a rope clothesline that was strung in the basement there, and tied one of the fellows first and then tied me second and had us all stand in a circle and tied us all in a circle.

Q. Did you get a look at these men? A. I observed at least three of them, yes, sir.

Q. How were these men dressed? A. Well, they were dressed rather sloppy. They had on overalls and jackets and slouch hats apparently, and one of them had a cap on, I believe.

Q. What kind of a cap was that? A. It appeared to be kind of a shop cap of some kind.

Q. All right. Continue on. You were then tied up in a circle. What happened after that? A. They tied us

41 up in a circle and had us all squat down, and there was one of them stayed there and guarded, and they throwed a coat over my head where I couldn't see, and it was quiet for a little bit, and there was one fellow came down with a set of keys and showed them to each one of us, to try to get somebody to identify them, and nobody identified them, and then one of them said, "We will blast them", or something like that, and then they left

again, and I started to shake this coat off of my head, and the one that was guarding us, he said "Quiet there", or something like that, and we sat there for some few moments, and I heard a car start. And then everything got quiet. We sat there a little bit while I was shaking this coat off of my head, and there was nobody there, just us. So we proceeded to untie ourselves and Gladson asked Mr. Knight, I believe it was, to go up and check on the wife. He went upstairs, and she was—well, all right.

Q. Did you go upstairs at that time? A. No, sir.

Q. You can't tell us what you heard from talking with other people. What did you do after you got yourself untied? A. Well, we just remained in the basement, and in a few minutes why Mr. Knight brought some trousers down for us to put on. We put these trousers on, and then went upstairs. And Roberts noticed his car was gone, and asked me to take him out to the State Patrol Station to report it.

42 Q. All right. Did you do that? A. Yes, sir.

Q. About what time was it when you got out to the Patrol Station? A. Oh, it was approximately 4:30 or 4:45, something like that.

Q. Did you talk with people out there— A. Yes, sir.

Q. —about what happened? A. Yes, sir.

Q. All right. Then after you made your report to the Trooper what did you do then? A. Roberts and I started back to Mr. Gladson's house, and he suggested that we drive around on some of the side roads there to see if anybody, to see if they might have abandoned his car in the vicinity some place, which we did. We drove around a little on some side roads and didn't locate his car. So we went back to Mr. Gladson's house.

Q. Now, you say there was a shotgun one was carrying? A. Yes, sir.

Q. Can you describe that? A. Well, it appeared to be a single-barrel, I would say about 12-gauge.

Q. What color was the barrel? A. It was a dark color.

43 Q. What kind of stock did it have? A. Sir?

Q. What kind of stock did it have? A. Well, I don't know as I paid that much attention to it, only that it was a shotgun.

Q. How were the other two men armed? A. They both had revolvers.

Q. Did you get a look at them? A. Yes, sir.

Q. Can you describe them to the jury? A. Well, I remember one of them was a nickel-plated revolver, and the other was a dark-colored revolver, appeared to be about a 38-caliber, I would say.

(Thereupon, State's Exhibits 9 and 10 were marked for identification).

Q. Now, Mr. McClendon, I will hand you State's Exhibit 9, first of all, State's Exhibit 9, and ask you if you can identify that?

* * * * * * * * * * *

45 A. It appears to be the same revolver to me that was used in the holdup.

Q. All right. ,Calling your attention to State's Exhibit 10, will you identify it? A. It has the appearance of one that was used in the holdup.

Q. Did you get a look at the handle of this chrome-colored gun? A. No, sir.

Q. Mr. McClendon, I hand you State's Exhibits 7 and 8, and ask you to take a look at those, sir. A. There was several one dollar bills in the game, and remarks were made about them in the game, and these look identical to the bills. And I remember this by the torn place and the other one as being taped up.

Q. Did you place your initials on these bills? A. Yes, sir. This is it right here (indicating).

Q. You put these initials on here yourself, did you? A. Yes, sir.

Q. Mr. McClendon, about how much money was in that game in the way of currency, not checks? A. Approximately between $700.00 and $800.00.

46 Q. Now, did you subsequent to the time you returned to the house ever see the men who were in the basement that evening of the robbery? A. Did I see them?

Q. Yes. A. Yes, sir.

Q. Where did you see them? A. At the State Patrol Headquarters there at Lee's Summit.

Q. When was that? A. Sunday morning around—I don't know—8:00 o'clock, something like that, I imagine.

Q. Are any of those men in the courtroom today? A. Yes, sir. Mr. Ashe, I believe is one of them.

Q. He is the man in the third chair here on the far side of the counsel table? A. Yes, sir.

Q. Now, had you ever known Bobby Ashe prior to that time? A. Yes.

Q. When was it that you knew him? A. Oh, I have known him for approximately twenty years.

Q. Are you and your family related to him in any way? A. Yes, sir, by marriage.

Q. How is that? A. My wife is his aunt.

Q. And when was the last time you saw him prior to this occurrence out at Gladson's? A. As near as I can re-
47 call, he was in my place of business a couple or maybe three months prior to this.

Q. Was anybody with him at that time?

Mr. Costello: I object to that, Your Honor. It is an improper question. He has made no showing of any conspiracy at that time.

The Court: What do you propose to show?

Mr. Furry: I propose to show that Johnson, one of the men who was arrested near the scene of this crime, was with this defendant and was introduced as his half-brother.

Mr. Costello: It is incompetent, Your Honor.

The Court: Is this witness going to testify he saw him with Ashe?

Mr. Furry: Yes, sir.

The Court: Overruled.

Mr. Costello: Exception.

Q. (By Mr. Furry) Was anybody with him at that time? A. Yes, there was.

Q. Who was that? A. He introduced a fellow by the name of Johnson as his brother, I believe.

Q. And did you ever see the man Johnson again after that time you saw him out at your place of business? A. No, sir. This particular instance here, yes.

Mr. Costello: I object—

48 Q. Then you did see—

Mr. Costello: I object to that as being incompetent, irrelevant and immaterial, and doesn't prove any issue in this case.

The Court: Overruled.

Mr. Costello: Exception.

Q. (By Mr. Furry) Just to clarify that, the morning that you saw Bobby Ashe following this occurrence at the Gladson's did you see and identify some other men? A. Yes, sir.

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49 Q. What were the names of the witnesses you—

A. Well, I think actually there was only three that I ever seen at one time in the basement.

Q. All right, sir. Did you later see those men? A. Yes, sir.

Q. Where did you see the man? A. At the State Patrol Station.

Q. And did you determine their name? A. It was Johnson and Larson and Brown.

Q. Did you also identify this defendant? A. I made a statement that I recognized that voice after seeing them in the show-up.

Q. You identified him by his voice, is that correct? A. Yes, sir.

Q. Well, let me clarify this again, sir. How many men did you actually see that morning? A. I never seen but three at any one time. Now, the fourth was a different one than the three that came down to get us to identify the keys or not, I am not sure.

Mr. Furry: All right, sir. I believe that is all.

Cross Examination

By Mr. Costello:

Q. Did you see three or four different men there? A. Three is all that I know of for sure.

Q. Well, you don't know whether there were three
50 men or four men? A. There was never but three in the basement at one time, I know.

Q. Do you know how many men participated in this hold-up? A. Presumably, it was four.

Q. How many did you see? A. Three.

Q. Why do you saw, "presumably"? A. We presume there was one that stayed upstairs to guard Mrs. Gladson.

Q. Did that man ever come downstairs? A. I say, I don't know whether the one who come down for us to identify the

keys was one of the same three in the basement or whether it was—

Q. This man that came down for you to identify the keys, he asked you to identify the keys, did he not? A. Yes, sir.

Q. You heard his voice? A. Yes, sir.

Q. Well, do you identify that as one of the men you saw over at the Patrol Station? A. I recognized the voice after seeing them in the show-up. It sounded very much like Ashe's voice.

Q. Was it the man who came down with the keys? A. Yes, sir.

Q. You think he is the man that came down and wanted to know about the keys? A. Yes, sir.

51 Q. What kind of a—Was this man down there during that hold-up—Was Ashe there during the hold-up? A. I don't know whether he was one of those in the basement or not.

Q. The three men in the basement talked, did they not? A. Yes, sir.

Q. You heard their voices down there? A. Yes, sir.

Q. What denominations of money did you have in front of you? A. Oh, I had between $150.00 and $200.00. It was in different denominations. I would say tens, fives and ones.

Q. Did you have any torn ones? A. I personally didn't, no.

Q. How many torn one dollars bills were in that game? A. Two is all I recall.

Q. You operate a retail business down there on the highway, do you not? A. Yes, sir.

Q. You take in quite a lot of bills and handle money? A. Yes, sir.

Q. Is it unusual for you to have torn dollar bills? A. I get them occasionally.

Q. You also get them taped up with cellophane, is that right? A. Right.

Q. What police officers did you talk to out there
52 at Lee's Summit? A. Well, Patrolman Gardner.

Q. Was he the first one that came down to the house? A. Yes, sir.

Q. He was the first one you talked to there? A. Well, he was out at the State Patrol Headquarters when we went out to report it.

Q. Did you tell him that Bobby Ashe was one of the holdup men? A. I don't recall telling him that.

Q. Well, did you or didn't you? A. I don't believe I did.

Q. In fact, you didn't, did you? A. No, sir.

Q. Now, your view was limited down there and your hearing because you were covered up with an overcoat, is that right? A. To a certain extent, yes.

Q. You say these men had on masks? A. They had on red bandanna handkerchiefs over their face.

Q. This man that you say was Bobby Ashe down there, did he have a mask? A. They all had masks on in the basement.

Q. These masks were tied around their faces? A. Yes, sir.

53 Q. Would that muffle their voice? A. I presume it would to a certain extent.

Q. It would change their voice, is that right? A. It could.

Q. So now you have testified here that the three men downstairs were Johnson, Brown and Larson, is that right? A. Yes, sir. That is who I identified them.

Q. That is who you identified as being downstairs there, but Ashe was not there at that time? A. I couldn't say for sure that he was.

Q. You couldn't say for sure that he was ever there, could you? A. Three is all I ever seen at any one time.

Q. You couldn't say Bobby Ashe was one of those men for sure? A. Not for sure in the basement, no.

Q. Or any other place, isn't that right? A. I guess it is right.

Q. You couldn't identify Bobby Ashe as being one of the men that participated in that holdup, could you? A. Just in the show-up I identified—

Q. You testified he is your nephew by marriage? A. My wife's nephew.

Q. He is your wife's blood nephew? A. Yes, sir.

Q. I believe you testified his father was your wife's brother? A. That is right.

Q. And you have known Bobby Ashe for some

54 twenty years, haven't you? A. Approximately, yes.

Q. He dropped in at your place from time to time? A. I would say two or three times.

Q. You were close enough to him you went to visit him in the hospital— A. Yes, sir, take him home.

Q. —when he was in the hospital two or three years ago? A. That is right.

Q. He has been at your place several times, and he customarily came and ate and had a few drinks, is that right? A. Yes, sir.

Q. Who did most of the talking in the basement? A. As I recall, the one that had the shotgun is the one that done the most of the talking.

Q. Do you know the denominations of the money? A. Yes.

Q. Could you give us any idea how many twenty dollar bills were on the table at the time of the holdup? A. No, I couldn't.

Q. Well, were there quite a few, or just a few, or what? A. Well, there was quite a number of them, I would say, yes.

Q. How about tens? A. Well, there was several twenties and tens and different denominations.

Q. And fives? A. Yes, sir.

55 Q. About how many ones? Could you give us any idea? A. No, I couldn't say for sure. It was quite a number of them, I would say.

Q. Could you tell us about how much money was on the table there at the time of the holdup? A. Well, each player had all their money in front of them on the table. It probably was approximately between $700.00 and $800.00 altogether.

Q. And how much money did you have there? A. I am not sure, but between $150.00 and $200.00.

Q. All right. Did you drop that money by a wastebasket or something, you said? A. Yes, sir.

Q. You recovered it there later? A. That is right.

Q. And you didn't tell the Highway Patrolman that Bobby Ashe was one of the bandits? A. No, sir.

Q. Was that because you didn't recognize Bobby Ashe as one of the bandits? A. I didn't as the holdup was in progress.

Q. Well, you have seen him many times in the last twenty years? A. Yes, sir.

Q. You went to the hospital to visit him? A. Yes, sir.

Q. He has been to your place of business? A. Yes, sir.

56 Q. As a matter-of-fact, you would know his hide in a tanning yard, wouldn't you? A. Well, I haven't been very close to the man.

Q. You recognized him every place you ever saw him? A. Yes, sir.

Mr. Costello: That is all.

Redirect Examination

By Mr. Furry:

Q. Had you ever seen him before with a mask on his face? A. Yes—

Q. What? A. No, sir.

Q. About how many times did he come to your place of business? A. Not over three or four times in the four years he had been there.

Q. He did not live at home? A. He had never been in my home, as I recall.

Mr. Furry: I believe that is all. Thank you.

(Witness excused)

(Thereupon, colloquy was had off the record).

The Court: Gentlemen, we are going to adjourn until 9:30 o'clock in the morning.

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57 WHEREUPON, at the hour of 9:30 a.m. on Tuesday, May 3, 1960, pursuant to the adjournment heretofore taken on Monday, May 2, 1960, the trial of this cause was resumed and the following further proceedings were had and entered of record, to wit:

Ray Roberts,

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. State your name and address, please. A. Ray Roberts, Lee's Summit, Missouri.

Q. Your occupation, Mr. Roberts. A. Livestock dealer.

Q. Mr. Roberts, were you at the home of John Gladson on the morning of January 10? A. I was.

Q. Did anything unusual happen that morning? A. Well, we had a hold-up.

Q. What happened that morning? A. Well, to start off with, on the evening before we were called by Mr. Gladson to come to his house for a card party which we did. And we gathered in, I guess, from eight o'clock on until
58 nine, something like that, and we played until, oh, approximately eleven o'clock and Mrs. Gladson brought us down some coffee and sandwiches, and then approximately four o'clock we heard some noise upstairs, somebody walking.

Q. What happened when you heard the noise? A. Mr. Gladson wanted somebody to go up and see who it was, because he has a heart ailment and don't get around too good, and I first started to, and Mr. Knight said he would. And Mr. Knight started up to see what it was and got to the door and the men was there at the door, and he turned around and hollered, "It's a hold-up, boys."

Q. When he hollered, "It's a hold-up," what did you do? A. All we done was just look and wait to see what happened, and the boys pounced in and ordered us to get away from the table, which we did.

Q. Your attention was directed to the door? A. Yes.

Q. What did you see when you looked toward the door? A. We saw three men, one of them had a shotgun and the other two had pistols. Two of them had a bandana on their faces and one had kind of a muslin mask over his face.

Q. The shotgun, will you describe it? A. Well, the shotgun, I would call it a twelve gauge. It seemed like an extra long barrel.

59 Q. And the pistols, did you look at those? A. Well, one I describe as looking like a sawed off four-ten. All I could see was the barrel to start with, and later on I saw the handle, and the other was a silver plated pistol with a pearl handle.

Q. All right. Now, when these men came in the basement, just tell the Court and jury in your own words what happened? A. Well, they told us to get away from the table, and we did so, and left everything as it was, and

then right away they ordered us to take our trousers off, and when they did that I started to reach for my pocket to get my pocketbook, and one of them said, "Don't reach for your pocket, I will blast you." So I immediately took my trousers off and laid them on the chair, and they ordered us to get over on the south wall and put our hands up on the wall.

Q. Did you do that? A. Yes, sir.

Q. Was anybody else over against the wall with you? A. Yes, sir.

Q. Who was that? A. Mr. Freeman and the whole bunch was over there eventually.

Q. And what happened while you were over there with your hands against the wall? A. Well, every time anybody started to look around they would tell us to look straight ahead, and they would come along behind us taking off our jewelry and searching our pockets. Our watches.

60 Q. Were you searched? A. Yes, sir, but while waiting on that I saw a chance to get my ring off and so I took it off and put it in my mouth, and one saw it, and he said, "Spit it out or I will blast you." So I dropped it. And they followed that up with a search behind our backs and come around to our pockets and took the rest of what was left.

Q. After you were searched what happened after that? A. They made us get down on the floor, sit down on the floor, back to back, and then one of the boys tore down a clothesline and tied up Mr. Goodwin with his hands behind him and had each one of us stand up, one at a time, and wrap the rope around us and made us sit down again on the floor with our backs to one another.

Q. All right. A. Then all the men but two left—all but one left and went outside. This one stood by the door.

Q. Which one was that, do you know? A. I couldn't tell you for sure.

Q. All right. The other two left, is that correct? A. Yes, sir.

Q. How long were they gone? A. Oh, I don't know, approximately two to five minutes, I would say, and they came back with a set of car keys, and there was two men present then, one had a shotgun and the other had the keys, and they had them folded open to make someone identify

61 them to see which car they belonged to.

Q. All right. What happened as far as the keys were concerned? A. Nobody identified the keys and one of them made a remark, said, "Just blast them, somebody will talk," and still nobody talked, so they went on out then and I guess in five minutes or ten minutes we heard a car start and that was it.

Q. These keys, did you later recognize them? A. Yes.

Q. Whose keys were they? A. They were mine, sir.

Q. How was it you didn't recognize them at the time? A. I carried two sets of keys. I have one set with two keys I use for my car, and the other has my door key, and post office key, and locker box key, and I keep an extra set on that.

Q. How were these men dressed? A. Oh, they had oversized clothes. One had a pair of unionalls on, and the other had—they had oversized overcoats, all of them had. Three had hats and one had a cap.

Q. What kind of hats did they have? A. One I know was brown, and there was one kind of a gray summer hat, and one green shop cap, and I believe the other hat was brown.

Q. You saw actually four different hats during the time you were down there in the basement, is that correct?

A. Yes, sir.

62 Q. Two brown, gray summer straw, and a green shop cap? A. Yes, sir.

Q. Now, after you heard this car drive away, what did you do then? A. We got up and started helping one another get untied and looked for some trousers and couldn't find them, and somebody made a remark, "We'd better go upstairs and see about Mrs. Gladson," and Mr. Knight went up and I went up with him.

Q. What did you see when you got upstairs? A. Mrs. Gladson was laying on the bed face down and had her hands tied behind her and her feet tied to her hands. They used the extension cord off the phone.

Q. Did you see the telephones? A. Yes.

Q. Where were they? A. The best I remember, they were on the floor.

Q. Then they were not connected to the wall? A. No, sir.

Q. What did you do when you got up and found Mrs. Gladson in this position? A. Mr. Knight and myself untied her and helped her get up and then we went back

to look for our trousers and couldn't find them, so right away Mrs. Gladson brought some of Mr. Gladson's down and we all got some clothes on.

Q. Now, after that, after you took care of getting
63 the trousers on, clothes, what did you do then? A. We went outside and looked to see what we could find. We looked in the garage first, and went out and I immediately missed my car.

Q. What kind of car were you driving that night? A. A '52 green Oldsmobile.

Q. Where did you park it? A. Right by the driveway.

Q. And you say it was gone, is that correct? A. Yes, sir.

Q. All right. What did you do then? A. Mr. McClendon and myself got in his car and headed to the patrol station to report it, and on the way out approximately two blocks east of Mr. Gladson's we saw a red bandana there in the road and we stopped and picked it up, and then continued on to the patrol station and went out and reported what had happened.

Q. All right. After making your report there at Troop A, where did you go? A. We went back up to 71 Bypass and checked the side roads, and so forth, seeing if by any chance they abandoned my car and left it out there somewhere, and we drove quite a ways out and come back the old Lee's Summit Road and come back to Mr. Gladson's after we didn't find anything.

Q. Did you go out any other time that morning, make any other searches? A. Yes, when we got back to
64 Mr. Gladson's Mr. Gardner was there, the Lee's Summit Patrol, and he taken a list from us of what each one lost, and then he left. And it wasn't very long until he come back and said they found the car out just off of Colborn Road at Unity in a field.

Q. Did you go up there? A. Yes, sir.

Q. Where was this field located? A. It was approximately, oh, I guess about three-quarters of a mile east of 50 Highway and Colborn Road junction.

Q. What time did you get up to the field? A. We went by there, I would say about that time, it was probably, oh, five-thirty, five-fifteen.

Q. And what did you do when you got up to the field? A. We drove down a little road that goes down to the

rock quarry to see if we could find where the car was and run onto Mr. Westerfield and he told us it had been backed up into the field.

Mr. Costello: Object to that as being hearsay.

The Court: Sustained.

Q. (By Mr. Furry) You saw Mr. Westerfield there? A. Yes, sir.

Q. Who is he? A. Patrolman at Unity.

Q. You met him at this rock quarry. After you had this conversation with him where did you then go? A.

65 We went back up by where the car was supposed to be and they had already picked the car up.

Q. Where did you go then?

Mr. Costello: I object to that as being hearsay, Your Honor.

The Court: Overruled.

The Witness: I went back up by where the car was supposed to be and it wasn't there. Then we went on around by Little Blue to check to see if they come down the railroad track, and when we got around there there was a Highway Patrol car sitting there checking that, so we went right on around and come around by Knobtown and come back by Unity, and by that time it was getting daylight enough to see.

Q. (By Mr. Furry) What did you do then? A. We went back to the scene where the car had been and parked and walked out across the field to see if we could find some tracks, which we did, and out there a short distance I found a twelve gauge shotgun shell, and then we followed the tracks on down toward the multiflora rose fence and it seems as though they had trouble getting through that.

Mr. Costello: I object to that as being a conclusion.

The Court: Sustained.

Q. (By Mr. Furry) What did you see at the multi-

66 flora rose fence? What did you see up by there?

A. Right near there we found a brown hat. And we followed some more tracks out toward the middle of the field where somebody evidently had fell, the dirt was dug up there, and we found Mr. Gladson's pocketbook about half covered up with dirt.

Q. You say the tracks led up to the multiflora fence? A. Yes. Then we went back up to where the car was and

two patrolmen were there and we turned the shotgun shell and pocketbook and things over to them for evidence.

Q. I hand you State's Exhibit Number 1, sir, and ask you to take a look at that—

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The Witness: Yes, sir, this is the pocketbook I found there in the field.

Q. (By Mr. Furry) All right. After turning the articles that you discovered there in the field over to the people who were there from the Police Department, what
67 did you then do? A. The patrol gave me the pocketbook back to return to Mr. Gladson, which I did, and we went back to Mr. Gladson's house then, and all of us had breakfast, and then after that we went back out again and went by where my car was.

Q. Where was that? A. At Burrow Brothers.

Q. Where is that located? A. 50 Highway just before you turn off 50 to go into Lee's Summit. Be close to 1st and 50 Highway.

Q. Did you see your car there? A. Yes, sir. It was inside the garage.

Q. Did you go in at that time? A. No, sir, the garage was locked up. We looked through the window.

Q. You say you looked through the window. Are you talking about the garage? A. Looked through the garage window and could see the car, yes, sir.

Q. All right. What did you do after that? A. After that we got back in Mr. Freeman's car and then we went back to Unity to see if we could help find any articles, and walked down across the field again, and after so long a time run across some of the Highway Patrol, and they asked us to—

Mr. Costello: I object to all of this as being immaterial.

The Court: Sustained.

Q. (By Mr. Furry) After you were there in the
68 field, did you go back to the garage? A. No, sir, not from there. The Highway Patrol asked us to go to the station to see if we could identify any of the boys.

Q. You went to Troop A after that? A. Yes, sir.

Q. Were you able to identify any of the men? A. Yes, sir.

Q. Do you see any of the men that were in the basement that evening here in the courtroom today? A. Yes, sir.

Q. Will you point him out, please? A. Right over here (indicating).

Q. In the third chair? A. Yes, sir.

Q. Did you learn his name? A. Yes, sir.

Q. What was it? A. Bobby Ashe.

Q. Did you identify anybody else? A. I identified them by numbers as they lined them up.

Q. Did you learn the names of the other men? A. Yes, sir.

Q. What were the names of the other men that you identified as being in the basement that morning? A. Mr. Ashe, and Larson, and Johnson, and Brown.

Q. Now, when you saw these men out at Troop A, was anybody else in the room with them at the time? A. Yes, sir, there were eight people in the line-up.

Q. All right. After then what else did you do
69 there at Patrol Headquarters, if anything? A. Well, that was all, other than I suggested about some marked dollar bills.

Mr. Costello: I object to that, Your Honor, as being a self-serving statement, hearsay.

The Witness: That wasn't hearsay.

The Court: Just a minute. Let me rule on the evidence. Sustained.

Q. (By Mr. Furry) Mr. Roberts, I show you what has been marked State's Exhibits numbered 7 and 8, and ask you if you can identify those? A. Yes, sir, that is the bills that was in the game.

Q. In the poker game? A. Yes, sir.

Q. Did you make any marks on those bills? A. Yes, sir, I initialed both of them.

Q. All right. Then did you leave Patrol Headquarters? A. We was around there for some time. I guess an hour or so.

Q. Did you ever go back to where your car was? A. Yes, sir.

Q. What time was that? A. Oh, I don't remember just what time it was. Approximately ten o'clock or eleven. I don't know for sure. I had asked when I could get the car, and they said they wanted to leave it there for fingerprints.

Q. Did you go over to Burrow's? A. Yes, sir.

70 Q. Did you see your car at that time? A. Yes, sir.

Q. Were you able to get in the garage? A. Yes, sir.

Q. All right. What did you do? Just tell the jury what you did. Not what you said, but what you did? A. All I done was look to see what was in the car and what kind of shape it was in.

Q. Where did you look? A. I looked in the front and back seat and floorboards and found some clothes in the front seat and some in the back seat, and they asked us not to disturb anything. They wanted to take fingerprints.

Mr. Costello: I object to that as being hearsay.

The Court: Sustained.

(State's Exhibits Numbers 11, 12 and 13 were marked for identification.)

Q. (By Mr. Furry) Mr. Roberts, I hand you what have been marked State's Exhibits 11, 12, and 13, and ask you if you will take a look at them and see if you can recognize them? A. Yes, sir. This is the picture of my car. This is a picture of the front seat and the way the clothes was in it.

Q. The first photograph you identified was State's Exhibit 11, is that correct? A. Yes.

71 Q. All right. And State's Exhibit 12 is a photograph of what? A. Of the front seat of the car and inside.

Q. State's Exhibit 13? A. That is a picture of the back seat of the car, the clothes and things like they were.

Q. Now, sir, do the physical objects that are shown in each of these three photographs correctly portray what you saw that morning when you went out to the Burrow Garage? A. About the same, yes, sir.

Mr. Furry: I offer in evidence State's Exhibits 11, 12 and 13.

Mr. Costello: What time did you see that car?

The Witness: The best I remember around ten o'clock, something like that. I saw it twice.

Mr. Costello: I am talking about—I believe the first time you didn't get into the car, did you?

The Witness: That is right. I didn't.

Mr. Costello: The garage was locked?

The Witness: Right.

Mr. Costello: And on your second trip which was about ten o'clock is when you looked through the windows of the car?

The Witness: Yes, sir.

Mr. Costello: Was that before or after you had been to the Patrol Headquarters?

72 The Witness: That was after.

Mr. Costello: To identify these men. After you had been up there?

The Witness: Yes, ten or eleven o'clock. I don't know what time it was.

Mr. Costello: Forget the time. Just in relation to the time you saw the four men in custody up at Patrol Headquarters, it was after that that you went down and saw the condition it was in as shown in Exhibits 11, 12 and 13, is that correct?

The Witness: Yes.

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73 Q. (By Mr. Furry) All right, sir. Will you tell us when you looked in the front seat of your car what you saw—in the front window? A. I just saw what clothes was in there. I never examined them, they asked me not to bother anything.

Q. You saw some clothes? A. Yes, sir.

Q. Where were they? A. Laying in the seat.

Q. Did you see anything else at that time? A. That is all that I would say that was visible at that time.

Q. Did you look in the rear seat? A. Yes, sir.

Q. What did you see back there? A. I saw a car coat of mine and some clothes just piled up there.

Q. About how much money in currency was in this game? A. I don't know how much was in altogether. I know about how much I lost.

Q. How much did you lose? A. In checks and all around eight hundred dollars.

Q. How much in currency? A. About two hundred,

74 plus my ring and wrist watch and gold money clip.

Q. Mr. Roberts, I hand you State's Exhibit Number 5 and ask you to take a look at that? A. That looks like the gun that was used that night.

* * * * * * * * * *

75 Cross Examination

By Mr. Costello:

Q. What is your business, Mr. Roberts? A. Livestock dealer.

Q. How long since you dealt in the livestock business?

A. It has been around four or five years. I drove
76 a ready mix truck about three years during that time.

Q. Would you say you quit driving a ready mix truck in 1958? A. Something like that.

Q. What has been your occupation? A. I have done some trading, dealt in a few used cars and dealt in some stock.

Q. When did you buy your last used car? A. I expect a couple of months ago.

Q. Who did you buy it from? A. A man by the name of Smith out in Raytown just off of Old 40.

Q. Is he an established dealer? A. No, sir, just an individual.

Q. Do you know his address? A. I have it at home.

Q. What kind of a car was it? A. A 1950 Dodge.

Q. What did you do with it? A. I still have it.

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77 Q. (By Mr. Costello) Who did you last buy any cattle from? A. Oh, it has been quite a little while. I bought some from Schmitty—we call him Bowman Schmidt. He lives south of Lee's Summit down by Greenwood.

Q. What is his name? A. Schmidt (Spelling) S-c-h-m-i-d-t.

Q. Greenwood? A. Yes.

Q. About how long since you have dealt with him? A. Occasionally I locate some stock and him and I maybe go buy them or he may take them to the yards. However it happens to work out.

Q. And you have no established place of business yourself? A. No, sir.

Q. In your cattle trading and car dealing, did you ever pick up any torn currency? A. Possibly occasionally.

Q. How long have you lived there at Lee's Summit? A. About thirty-six years.

Q. I believe you live in Prairie Lee, is that right? A. Yes, sir.

Q. Now, you said that you saw four different men there that night in the basement? A. Yes, sir.

78 Q. And later you say up at Patrol Headquarters you identified one of these men as being Bobby Ashe? A. Yes, sir.

Q. Isn't it a fact that when you went up to the Patrol Headquarters to identify these men they told you this was Bobby Ashe, they had Bobby Ashe there? A. No, sir. Not until afterwards we learned their names. I didn't know none of their names.

Q. How did you identify Bobby Ashe? A. I identified them all by numbers.

Q. Well,— A. 1, 3, 4, and 7.

Q. They didn't wear any numbers during the hold-up, did they? A. No, sir.

Q. How did you connect these numbers? A. By their size and their actions.

Q. You saw they all wore out sized clothes, I believe? A. Still you could tell a man't height and build.

Q. Even if he had on loose clothes? A. Yes, sir.

Q. How were they dressed at the show-up? A. How?

Q. Yes? A. Well, they had—some of them had different clothes on. One of them had a white shirt, best I remember, and one had on a pair of green unionalls with the leg torn on it.

Q. What did Bobby Ashe have on? A. A white

79 shirt and the color of the trousers I don't remember.

Q. He didn't have any out sized clothes then? A. No, sir, that is all he had on at that time.

Q. These men were dressed completely different from when you saw them in the basement, is that right? A. Yes, sir.

Q. What did Bobby Ashe do in the basement? Which one of the three was Bobby Ashe? A. I couldn't tell you particularly what either one done.

Q. Either? A. Any one of them.

Q. How many did you see there? A. Three.

Q. You couldn't tell this jury what any one of them was doing? A. No, sir.

Q. You don't know who took Don Knight's property? A. No, sir.

Q. Whether Bobby Ashe took it or somebody else took it? A. No, sir.

Q. You were facing a wall, I believe, during this part of this time? A. Right.

Q. The rest of the time you were down on the floor roped with these other men? A. Right.

Q. Who did the talking down there? A. First one and another done some talking.

Q. They had on masks? A. Yes, sir.

Q. Do you think that would muffle their voices?

80 A. Yes, sir.

Q. Did you identify this man by his voice? I am speaking of Bobby Ashe. A. I wouldn't say particularly. There was one in the bunch that had an odd voice, and whether it was him or not, I couldn't tell you.

Q. So you didn't identify him by his voice? A. No, sir.

Q. Okay. You never saw his face? A. No, sir.

Q. Bobby Ashe's face at the hold-up? A. No, sir.

Q. So that your identification is based on this man's size? A. Right.

Q. You couldn't tell what he weighed with all those out sized clothes, could you? A. I could tell approximately his build.

Q. You couldn't tell whether he was heavy or lean, could you? A. Yes.

Q. You could? A. Yes, you could tell.

Q. With out sized clothes? A. Yes, you could tell approximately the way the clothes would hang on them their build.

Q. You couldn't see their face? A. That is right.

Q. To see if they were fat or thin. How tall were these other men in the line-up? A. How tall?

81 Q. Yes? A. Well, they would run different sizes. There was eight of them.

Q. There were eight of them? A. Yes, sir.

Q. Were they all the same height as Mr. Ashe? A. No, sir. I would say they would run all the way from five feet five or six to six foot one or two. Varied in height.

Q. Are you acquainted with Mr. Cottingham? A. Who?

Q. A Mr. Cottingham? A. No, sir.

Q. Are you acquainted with Mr. Williams out there in the sod business? A. I know a Gene Williams that is working for a man laying sod, yes.

Q. How big is Mr. Williams? A. How much would he weigh?

Q. I asked how tall he was first? A. I would say around five foot six or seven.

Q. Five foot six or seven? A. Yes, sir.

Q. What would he weigh? A. Approximately between one hundred and fifty and one hundred sixty.

Q. Do you know a Sam Rhoades out there? A. No, I don't know him.

Q. Do you know who he is? A. I know of him.

Q. Ever seen him? A. I saw him there that day, yes, sir.

Q. You knew of him prior to that time, did you not? A. I knew of him butt I didn't know him.

82 Q. I believe he was a truck driver, wasn't he? A. I don't know what he was doing, sir. I never inquired.

Q. So you didn't see Mr. Ashe's face? A. That is right.

Q. You can't identify his voice? A. No.

Q. Is that right? A. That is right.

Q. You say you identify him by his build? A. Yes.

Q. Even though all of the men had on out sized clothes? A. Yes.

Q. You say they had on gloves? A. Yes, sir.

Q. So you couldn't see their face or hands? A. That is right.

Q. You could not see the true outline of their bodies, is that correct? It was distorted by the out sized clothing? A. That is right.

Q. Now, on what basis can you come in here and positively identify Bobby Ashe? A. By his size and height.

Q. And that is all? A. Yes, sir.

Q. And if there was somebody else his size and height, you would have to identify them too? A. Well, I would'nt say that.

Q. Well, what else would you base it on? How would you tell? A. His size and height, and his actions. Every-

83 body acts some different.

Q. You said you diidn't know which man was Ashe in the basement there? A. That is right. I wouldn't have to know his name to remember the same actions again.

Q. How would you know who was acting if you didn't know which was which there? A. According to size.

Q. According to size? A. Yes, sir.

Q. With over sized clothes? A. Yes.

Q. How tall is John Edward Johnson? A. Oh, I would say he is approximately six foot.

Q. About the same height as Ashe? A. Pretty close, yes, sir.

Q. How about Brown? A. Oh, Brown is around five foot six or seven.

Q. Think he might be a little taller than that? A. I don't know. That would be my guess.

Q. But you don't know which one of these men were doing what in the basement? A. Not specifically, no, sir. Different ones was giving orders.

Q. So you don't know what Mr. Ashe's actions were and thereby you couldn't identify him by his actions? A. Other than just moving around and going first one place and another.

Q. Well, all three or four men were doing that?

84 A. Not at that time. Only three at that time.

Q. Were the three of them moving around? A. Yes, sir.

Q. A good part of this time you were facing a wall when these actions were taking place, is that right? A. That is right.

Q. Along with Mr. McClendon and Mr. Gladson, I believe? A. Right.

Q. You recall what denominations of bills you had before you, Mr. Roberts? A. What I had in front of me?

Q. Yes? A. No, sir. I had some ones and fives and some twenties. I don't remember specifically how many of each or what.

Mr. Costello: That is all.

Mr. Furry: I believe that is all, Mr. Roberts. Thank you.

(Witness excused)

Charles Westerfield.

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. Charles Westerfield, Lee's Summit, Missouri.

85 Q. What is your occupation, Mr. Westerfield? A. I work at Unity Farm, night patrol.

Q. Were you employed on that particular job on the night of January 9 and early morning of January 10 of this year? A. I was.

Q. Did anything unusual happen while you were out there at Unity Farm? A. Yes, I was making the rounds, patrolling the grounds.

Q. What are your duties, before we get into that? A. Just to patrol the farm area, grounds on Unity Farm.

Q. Go ahead? A. And I was doing this on Colborn Road bordering the farm there. I found a car parked on the Unity property.

Q. Where was this car parked? A. It was parked on the north side of the road behind a trimmed hedge fence.

Q. What direction was it headed? A. The car was headed west.

Q. All right. What kind of car was it? A. A '59 black Chevy.

Q. Did you take a license number of that car? A. Yes, I did, and the time that I found it. The license number was Missouri 737-312. And it was at 4:10 when I found this car.

Q. All right. Was anybody in the car at that time?

86 A. No, there was not. No one in it or around it. I looked around the grounds and seen no one.

Q. Then what did you do, sir? A. Well, I made repeated passes by this car, running up and down the road this short distance, and when I would get to this spot I would throw a spotlight over in the area trying to locate someone, find who owned the car. I was traveling east and there was no cars in sight, but I did see a reflection in the back of my car in the rear view mirror, so I was already past this spot where the car was at, so I went a short distance and turned around and came back. I didn't see any car, so I supposed this might be the car I was looking for. So I got even with the spot and while I was yet on the highway I throwed my spotlight over in the area and saw this '52 Oldsmobile parked out in the field.

Q. When you got up to the field there, did you actually turn into the field? A. No, I did not. I was still on the highway yet when I turned the spotlight over there.

Q. When you turned the spotlight on, you say you saw a '52 Oldsmobile? A. Yes, green.

Q. Where was it in relation to the gate entrance? A. It

was parked slightly off to the center but parked north out in the field.

87 Q. How far out in the field? A. Oh, four or five car lengths.

Q. How far was it from this 1959 Chevrolet? A. About three car lengths distance.

Q. When you turned your spotlight on this 1952 Oldsmobile, tell us what you saw and what happened? A. Well, I saw one man on the side of the car next to me laying on the ground. He had his head towards me. Two men were on the opposite side of the car, on the north side of the car, and I pulled on through, turned directly into this driveway there, and shined the spotlight back around looking for the man laying on the ground. Just in that second or two he was gone.

Q. Where was he in relation to the Oldsmobile when you saw him lying on the ground? A. He was on the south side of the Oldsmobile next to the road.

Q. That would be toward the rear, behind the rear of the car? A. More or less about the center of the car, of the Oldsmobile.

Q. All right. Were you able to recognize that man on the ground? A. No, he had a cap on. His head was towards me. I saw him for a little bit and he had on a bill cap, dark clothes.

Q. Do you know the color of the cap? A. It was a dark green, army green color.

Q. Then these other two men, did you notice them?

88 A. I noticed one in particular had a full length topcoat on, light in color. It was open and flared out while he was running across the field.

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Q. (By Mr. Furry) Which direction did these men run from the Oldsmobile, the two men? A. The two men ran north.

Q. And as you looked north, what is the terrain? A. There is a multiflora rose fence bordering this field on the north.

Q. On the north side? A. Yes.

Q. Did you get out of your truck at that time? A. I did look around the area and searched it out with the spotlight, but found no one.

Q. What did you do then? A. I went down to the dairy a short distance down the road from this spot and talked to two men who were working there and told them
89 what I found, these two cars being parked in the field and the boys.

Q. What did you then do? A. I took these two men back to the spot, and we sat there in the spot and talked for a minute or two, and spotted this object laying out in the field, and couldn't get a very good view of it, so we got out to see what it was.

Q. What was it? A. We found a shotgun, twelve gauge shotgun.

Q. Where was the shotgun laying in relation to these cars? A. It was laying to the back of the car, I suppose about six foot from the right back bumper.

Q. Of which car? A. Of the Oldsmobile.

Q. Did you pick that gun up? A. Yes.

Q. Mr. Westerfield, I hand you State's Exhibit Number 5 and ask you if you can identify that? A. Yes, that is the shotgun I picked up.

Q. And are there some initials on that gun? A. I have my initials on here, "C. W." dated 1-10-60.

Mr. Furry: I reoffer into evidence State's Exhibit Number 5.

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90 (State's Exhibit Number 5 was received in evidence.)

Q. (By Mr. Furry) Did you find anything else out there in the field? A. No, that was all I found.

Q. While you were there in the field did anybdoy else arrive? A. Not at this particular time, no.

Q. Well, what happened? A. Well, I took these men back to the dairy, and came back and looked over the area, and called my dispatcher and reported the license numbers and he got a car check with the State Patrol.

Q. You have a radio in your car? A. Yes, I do.

Q. And you made your report? A. Yes, sir.

Q. Did you then stay there at the field or in that area? A. Yes, I did.

Q. Did somebody arrive shortly thereafter? A. The Sheriff's Patrol, Grantham and Trooper Millsap.

Q. That is Dewey Millsap, Troop A? A. That is right.

Q. Did you stay at the area then? A. No, I went on patrolling the farm. I think about everything was
91 turned over to Trooper Millsap at that time.

Q. Did you change or alter anything about either of these two cars from the time you found them until the time Trooper Millsap arrived? A. No, sir, I did not.

Q. Were you there when the cars were taken away? A. No.

Q. All right. Did you find anything else in connection with this? A. No.

Mr. Furry: Fine. Thank you. That is all.

Cross Examination

By Mr. Costello:

Q. You don't identify Bobby Ashe, the defendant, as being one of the men in that Oldsmobile? A. I couldn't identify him, no.

Mr. Furry: You couldn't identify anybody running across the field?

The Witness: No, I couldn't.

Q. (By Mr. Costello) You turned your spotlight on them when you got out of your car? A. Yes, but I was on the highway. One man was on the ground and the other two were on the north side of the car. The only time I could see them actually full length is when they were in the field running.

Q. You were about fifty or sixty feet away, if I understand your testimony correct? A. Fifty or sixty. It
92 is just a short distance off of Colborn into this field.

Q. About how far was it? A. Well, it possibly would have been that distance.

Q. They weren't running when you first turned your light on them? A. Well, they were on the north side of the car. No, it appeared they just got out of the car.

Q. Were they all on the same side of the car? A. No, there were two on the north side of the car and the one man on the south side was laying on the ground.

Q. And how long did you stay on duty, Mr. Westerfield, that morning? A. Until noon Sunday.

Q. Did you participate in the search of the area? A. No, I went back to the farm.

Q. You went on with your regular duties? A. Yes.

Mr. Costello: I think that is all.

Re-direct Examination

By Mr. Furry:

Q. There were a number of other police officers there, weren't there? A. Yes, there were.

Mr. Furry: Fine. Thank you. That is all.

(Witness excused)

Charles A. Gardner.

93 called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. State your name and address, please? A. I am Charles A. Gardner, 108 O'Brien Road, Lee's Summit, Missouri.

Q. Your occupation, sir? A. I am a police officer for the City of Lee's Summit.

Q. Did you have occasion to make an investigation in connection with an incident out at the Gladson home back on January 10? A. I did, sir.

Q. Officer Gardner, when did you first get involved in this thing, hear about it? A. I was at the Highway Patrol Station when Ray Roberts and Rich McClendon came to the Patrol Station to report a stolen car.

Q. After the report was given to you, what was the next thing you did? A. I went to the residence.

Q. You made an investigation there, is that right? A. At the home of John Gladson.

Q. Did you at any time go out to the Unity Farm that morning? A. I did later.

Q. Did you make a search in that area? A. I did.

Q. Did you find anything? A. I found a pair of
94 gloves and a diamond ring in the area.

Q. Where did you find the gloves and diamond ring? A. About one and a half blocks—one to one and a half blocks north of the two cars that were setting in the field.

Q. Where would that be? This was a field, was it not? A. Yes, sir.

Q. Was there a fence, multiflora rose fence on the north side? A. There was.

Q. Where was the ring and gloves found in relation to this multiflora rose fence? A. Oh, approximately two hundred feet north of the fence.

(State's Exhibit Number 14 was marked for identification.)

Q. I hand you two objects here which have been marked. One of them is State's Exhibit 2, which is in evidence and is a ring, and I hand you State's Exhibit 14 for identification and ask you to take a look at that. A. (Witness complies).

Q. Can you identify State's Exhibit Number 14? A. Yes, sir.

Q. What are they? A. Those are the gloves that I found.

Q. And this ring, which is State's Exhibit Number 2? A. That is the diamond ring I found.

Q. Where did you find the ring? A. In the left
95 hand glove.

Q. Inside the glove? A. In the little finger.

Mr. Furry: I offer in evidence State's Exhibit Number 14.

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(State's Exhibit Number 14 was received in evidence.)

Mr. Furry: You may inquire.

Mr. Costello: I don't believe I have any questions
96 of this witness.

The Court: All right.

(Witness excused)

The Court: Let's have our morning recess.

(Recess)

Carl Milton Foster

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. Carl Milton Foster, 9924 East 38th Street, Kansas City, Jackson County, Missouri.

Q. Your occupation? A. Deputy sheriff.

Q. Jackson County, Missouri? A. Yes, sir.

Q. Were you so employed on the 10th day of January, this year? A. I was.

Q. Did you have occasion to make an investigation in connection with an incident out at the Gladson home near Lee's Summit, Missouri? A. Yes.

Q. Did you have occasion to go to a field out in that area? A. I went to a field just east of Unity Farm adjoining the highway of Colborn Road on the north.

Q. What time did you get out there? A. About 5:30.

Q. What did you do when you arrived? A. I
97 searched the field, and about three hundred feet north of Colborn Road I followed the tracks from the two abandoned cars, and I found a hat and one hundred and thirty-two dollars at the hedge row about—

Q. A hat and what else? A. One hundred thirty-two dollars in cash.

(State's Exhibit Number 15 was marked for identification.)

Q. Sergeant Foster, I hand you what has been marked State's Exhibit 15 for identification and ask you to take a look at that. Tell us what it is, if you can? A. This is the hat I found by the hedge row.

Q. And where is this hedge row in relation to the two cars? A. About three hundred feet north and a little west.

I. I believe you said you observed something between the cars and this point where you found the hat? A. A red and white bandana.

Q. Where was it found? A. About fifty feet north of the cars.

Q. And this hat, did you make any identifying mark on it? A. Yes, sir, my initials and date 1-10-60 inside the band.

Mr. Furry: I offer into evidence State's Exhibit Number 15.

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98 (State's Exhibit Number 15 was received in evidence.)

Q. (By Mr. Furry) Now, this money that you found, where did you find that, sir? A. It was laying beside the hat at the hedge row.

Q. How much money was it? A. One hundred and thirty-two dollars.

Mr. Furry: I believe that is all.

Cross Examination

By Mr. Costello:

Q. Was any of this money torn, Sergeant? A. I don't remember whether it was or not, sir.

Q. Do you recall what denominations it was? A. Five tens, fifteen fives, and seven ones.

Q. How long did you continue searching around there, Sergeant? A. Oh, probably an hour and a half. Until they picked up the men.

Mr. Costello: I think that is all.

99 Mr. Furry: That is all.

(Witness excused)

George Murphy,

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. George Murphy, Lizzy Ann Trailer Court, Belton, Missouri.

Q. What is your occupation? A. Lineman, Bell Telephone Company.

Q. Were you employed for Bell Telephone Company as a lineman back in January of this year? A. Yes, sir.

Q. Mr. Murphy, I am going to hand you what is in evidence as State's Exhibit Number 6 and ask you to take a look at that, if you will, please, sir, and tell us what it is? A. Yes, sir. It is the billfold that I found out on Bannister and Noland Road, just east of Noland Road on Bannister on the 28th day of January.

Q. Of this year? A. Yes, sir, 1960.

Q. At that time what were you doing? A. We were setting a new pole there for the rock quarry that is going in there. They were tearing down a line so we set a new pole in there to clear the right of way.

Q. Were there cards in the billfold as there are

100 now? A. Yes, sir.

(State's Exhibit Number 16 was marked for identification.)

Q. Mr. Murphy, I hand you what has been marked State's Exhibit Number 16, and ask you to identify that, if you can, sir? A. Yes, that is the picture of the pole that we were setting on that day.

Q. You can identify this? A. Yes.

Q. What is it, sir? What area? A. It is the area—the road going into the rock quarry off Bannister Road where we set the pole.

Q. Do the physical objects that are portrayed in the photograph appear as they were when you were out there on January 28th? A. The power company has put a new pole in, but the pole we set is still in.

Q. Other than the power company putting a new pole in are the physical objects the same? A. Yes, sir.

Mr. Furry: I offer into evidence State's Exhibit Number 16.

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101 (State's Exhibit Number 16 was received in evidence.)

Q. (By Mr. Furry) Now, sir, State's Exhibit Number 16. Looking at this photograph, was the point where you found this billfold, is that shown on this photograph? A. Yes, sir.

Q. Where would it be? Can you point that out? A. It would be approximately right in here, this area right in here (indicating).

Q. Where was the pole you were putting in you told us about? A. This pole right here (indicating).

Q. The billfold was right down by the ditch? A. Yes, sir, right in the ditch line.

Mr. Furry: Thank you very much. I believe that is all.

Mr. Costello: No questions.

102 (Witness excused)

The Court: We are going to have a short recess.

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103 (State's Exhibits Numbers 17 and 18 were received in evidence.)

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(Whereupon the following proceedings were had and entered of record in the presence and hearing of the Jury.)

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. Trooper D. E. Millsap, Lee's Summit, Missouri.

Q. Your occupation, sir? A. State Highway Patrolman.

Q. How long have you been on the Highway Patrol?

104 A. Since July 1, 1946.

Q. Were you on the patrol on the day of January 10, this year? A. I was.

Q. Did you have an occasion to investigate an incident that occurred at the Gladson home? A. I didn't make an investigation at the home, no.

Q. Did you receive a call in regard to that? A. I was at our office on Highway 50 at 4:45 a.m. or about 4:45 when Mr. Ray Roberts and Rich McClendon came in the office and stated they had been held-up at the Gladson home.

Q. Now, after receiving the report from McClendon and Roberts, what did you do? A. Well, I got my patrol car and started working north out of Lee's Summit. I started working side roads thinking they would set the Roberts' car down north of town.

Q. Did you find anything? A. No, I didn't find anything or locate anything until about 5:17 a.m. I received a call from my office stating the car had ben located—

Q. You received a call from your office, is that right? A. About 5:17 a.m., yes, sir.

Q. After receiving this call, without going into what was said, tell us what you did? A. I proceeded to Unity Farm at a location seven-tenths of a mile east of

105 Highway 50 on Colborn Road.

Q. What did you find there? A. I found two automobiles. An Oldsmobile owned by Ray Roberts and a black 1959 Chevrolet.

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Q. (By Mr. Furry) You found two cars in the field, is that right, Officer? A. Yes, sir.

Q. Now, what type of cars were they? A. The Olds-

mobile belonging to Ray Roberts and there was a black 1959 Chevrolet.

106 Q. A black '59 Chevrolet and a green Oldsmobile, is that correct? A. That is correct.

Mr. Furry: All right. Would you please mark these?

The Witness: The Oldsmobile was a 1952 Oldsmobile.

(State's Exhibits Numbers 19 and 20 were marked for identification.)

Q. (By Mr. Furry) All right, sir. I hand you what has been marked State's Exhibits 19 and 20 and ask you to take a look at them? A. Yes.

Q. Let's take 19 first. You have 19 in your hand. Just identify that for us. What is it? A. This is a photograph taken at the scene. I was standing about the location where the '52 Oldsmobile owned by Ray Roberts was abandoned.

Q. Do the physical objects that are shown in that photograph correctly portray what you saw there the morning of the tenth? A. Everything except the field.

Q. What is the difference? A. The ground in the field has been cultivated since the cars were recovered.

Q. Was the area out there a field at the time the cars were found in there? A. Yes, sir.

Q. The only difference is the cultivation of the soil? A. That is right.

107 Q. Now, I hand you State's Exhibit Number 20 and ask you just to identify that if you can? A. Yes, sir, that is a picture of myself standing at approximately the location where the black 1959 Chevrolet was found.

Q. Did the physical objects with the exception of the plowed ground appear to be the same as they were the morning of the 10th of January? A. They do.

Mr. Furry: I offer into evidence State's Exhibits 19 and 20.

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(State's Exhibits Numbers 19 and 20 were received in evidence.)

108 Q. (By Mr. Furry) Referring to State's Exhibit 19, again for the jury, just tell them exactly what this is? A. In this I am standing about the location where

the '52 Oldsmobile owned by Ray Roberts was found abandoned. The car was headed in a northern direction. All four doors were open on the car.

Q. As you look at this photograph what direction are you looking as you look at the photograph? A. Northeast.

Q. And where was the 1959 Chevrolet? A. Right behind this hedge fence. Just behind the fence here.

Q. Referring to State's Exhibit Number 20 you are standing in the field. That is picture of you, is that correct, sir? A. That is right.

Q. What point does that depict? A. That is about the location where the 1959 Chevrolet was abandoned.

Q. All right, sir. Fine. When you arrived there, what was the condition of the Oldsmobile? A. The Oldsmobile was headed parked in a northern direction with all four doors open.

Q. What did you do, if anything? A. I closed all four doors and had the cars both towed in.

Q. How long was it from the time you arrived until the time the cars were towed away? A. I would say about twenty or twenty-five minutes.

109 Q. Did you or anyone else there at the time go inside the cars? A. No one entered the cars or handled the cars from the time I arrived until they were towed in.

Q. Who towed them away? A. The Burrow Brothers, Lee's Summit, with instructions to lock the cars up when they towed them in.

Q. All right, sir. Now, after the cars were towed away, just tell us, did you then continue your investigation? A. I continued it. I started patrolling the area looking for the boys.

Q. Did you find anybody? A. Yes, sir.

Q. Who did you find? A. At 8:45 a.m. I was driving south, in a southern direction, on Highway 50 at a point five-tenths miles north of Colborn Road. I saw Thomas Eugene Brown standing by a fence on the west to southwest—

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110 (State's Exhibit Number 21 was marked for identification.)

Q. (By Mr. Furry) Trooper, I hand you what has been marked State's Exhibit Number 21, and ask you if you can identify that? A. I can.

Q. What is it the picture of? A. Myself in the location where Brown was picked up.

Q. Do the physical objects that appear in this photograph correctly portray what you saw there that morning? A. They do.

Mr. Furry: I offer into evidence State's Exhibit Number 21.

Mr. Costello: Are you going to have him identify the other pictures at this time?

Mr. Furry: Yes.

Mr. Costello: Why don't you do that and I will object to all of them at the same time.

Mr. Furry: All right.

(State's Exhibits Numbers 22 and 23 were marked for identification.)

Q. (By Mr. Furry) Now, for the record I hand you what have been marked State's Exhibits 22 and 23 and
111 ask you—first of al, 22, can you identify this area? A. Yes, sir.

Q. What is it? A. Tha is the area where Johnson and Larson were picked up on Noland Road about three-tenths of a mile south of Bannister.

Q. And the person in he photograph? A. Myself.

Q. Do the objects shown in this photograph correctly portray what you saw that morning? A. They do.

Q. State's Exhibit Number 23? A. That is the same location looking slightly more to the south.

Q. Does it fairly and accurately portray what it shows? A. Yes, sir.

Mr. Furry: I offer into evidence at this time State's Exhibits 21, 22 and 23.

* * * * * * * * * *

112 (State's Exhibit Numbers 21, 22 and 23 were received in evidence.)

Q. (By Mr. Furry) Trooper Millsap, I show you what is State's Exhibit Number 21 here and this photograph now shows what? A. This is myself standing here with

Unity Tower in the background. Hazel Grove School is over here on the left.

Q. Now, you say you arrested a man by the name of Brown, is that correct? A. That is right.

Q. Where was he standing? A. At about the location where I am standing, facing about the same direction. Facing west.

Q. That would be looking toward the west, is that correct? A. That is correct.

Q. What was Brown's condition when you arrested him? A. Brown had about—I would say about three days growth of beard. He had loose dirt in his beard on his
113 chin. His pants legs were torn, his legs were scratched and blood was oozing through the scratches on his legs. He had dirt on his shoes.

Q. All right, sir. Did you search him at that time? A. I did.

Q. Did you obtain any money from him? A. I did.

Q. What did you obtain from him? A. At the time Brown was arrested he had a billfold and some miscellaneous papers. He had one pocketknife, cigarette lighter, comb, set of keys, a St. Christopher medal, one twenty dollar bill and seventy cents in change.

Q. All right, sir. What did you do with Mr. Brown? A. I placed him under arrest and put him in the patrol car.

Q. All right. And then did you make any inquiry of him as to what he was doing out there at that time? A. Yes, I asked him why he was out there.

Q. What did he tell you? A. He stated he came to Lee's Summit with a friend who ran off and left him.

Mr. Costello: I object to that, Your Honor, and ask it be stricken.

The Court: This defendant was not present?

The Witness: No, sir.

The Court: Sustained.

Q. (By Mr. Furry) All right, Trooper Millsap.
114 After you placed him under arrest, what did you do then? A. I continued to look for more suspects.

Q. Where did you search? A. Still north of Lee's Summit and north and west of Unity Farm.

Q. All right. Did you find anybody else or did you arrest anybody else? A. Yes, sir. At 9:20 a.m. I was driving south on Noland Road at a point three-tenths of

a mile north of Bannister and came upon Johnson and Larson.

Q. What were they doing when you saw them? A. They were walking north on the pavement.

Q. What type of area is it out there where you arrested them? A. Open country.

Q. Now, sir, I show you Exhibit 22 with a man standing in the photograph. Who is that? A. That is myself.

Q. What does this area show? A. That is looking almost east towards Unity Farm. You can see the top of the Unity Tower here on the left portion of the picture (indicating).

Q. Was this the area where you picked up these two men, Larson and Johnson? A. It is.

Q. And State's Exhibit Number 23? A. That is the same location only looking a little more to the south, looking back over where they opened up a rock quarry on Bannister Road. There is a foundry up here on the
115 hill on Bannister Road.

Q. Can you tell me, sir, the distance—this road runs north and south, does it not? Noland Road? A. That is right.

Q. As you go south on Noland Road from this point what is the next point you come to? A. A road?

Q. As you go south from this point, if you were going south? A. Come to Bannister.

Q. Bannister Road. That would be the same as 95th Street? A. Correction. There is a small road that crosses this road before you get to Bannister Road.

Q. Is it a main east and west road? A. No, it is not. It is dead end both ways. The next main road is Bannister Road.

Q. Can you tell me the distance from Bannister Road over to where this road is into the rock quarry? A. Not exactly. I would estimate it about three-tenths of a mile.

Q. All right, sir. Now, first of all, let's talk about Johnson. What did you do when you arrested Mr. Johnson? A. I searched him.

Q. What did you find when you searched him?

Mr. Costello: Your Honor, I am going to renew my objection. It was out of the presence of this defendant.

The Court: The question is what he found, not
116 what he said. Overruled.

The Witness: Johnson had on his person one pair of leather gloves, one comb, two hundred and seventy dollars and fifty-five cents in currency.

Q. (By Mr. Furry) You say he did have some gloves? A. One pair of leather gloves.

Q. What color were they, do you remember? A. As I recall they were brown.

Q. Now, Trooper Millsap, I am going to hand you State's Exhibits 7 and 8 and ask you to take a look at those and tell us what they are, if you know?

* * * * * * * * * *

A. These are two bills taken from Johnson's left front coverall pocket. The money he had on him was
117 loose in a roll in his left front pocket.

Q. Did you make any identifying mark on those bills? A. I did. My initials and the date on both of them.

Q. Thank you, sir. How was Johnson dressed? A. Johnson was wearing a pair of green shop coveralls and a matching green shop cap and jacket.

Q. All right. What about Larson? A. You mean his dress?

Q. His dress, and just tell us what you did as to him? A. Larson was searched also. Larson had a large folding type—what I call a book type billfold, miscellaneous papers, one collar pin, one pair of nail clippers, one key, and one hundred and seventy-two dollars and seventy-five cents in money. He was wearing a white shirt, gray dress trousers, and brown dress shoes, and gray zipper type jacket.

Q. All right. What did you then do with these men? A. I searched them, had them stand by the side of the patrol car until I called for another car to come to where I was located and pick them up.

Q. Where were they taken? A. To our office at Lee's Summit.

Q. Now, I believe you told us—I am not positive—can you tell us the distance from the point where you picked up Johnson and Larson on Noland Road south to
118 Bannister Road? A. That is three-tenths of a mile.

Q. State's Exhibit 16, tell us what that is, sir? A. That is the entrance to a rock quarry they opened up

this past winter on Bannister Road there at Unity Farm.

Q. That is the distance you estimate there was three-tenths of a mile from Noland up to this road here? A. That is right.

Mr. Furry: Fine. Thank you, sir. I believe that is all.

Cross Examination

By Mr. Costello:

Q. Did you ever testify as to finding a different amount of money on Johnson? A. No, sir.

Q. Never testified you found one hundred and seventy dollars on him? A. No, sir.

Q. You never had any connection with Ashe out there, never saw him at the time you are speaking of when you saw these other three men you testified to? A. The first time I saw Ashe was at our office at Lee's Summit.

Q. At the time you are talking about you had no connection with Ashe? He was not present at any time? A. No.

Mr. Costello: I believe that is all.

(Witness excused)

119 (Whereupon the jury being duly admonished, a noon recess was taken.)

AFTERNOON SESSION

Tom Ferguson.

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. I am Tom Ferguson, Lee's Summit, Missouri.

Q. What is your occupation? A. I am a Missouri State Trooper.

Q. How long have you been on the State Patrol? A. Since August 1, 1952.

Q. Were you so employed on the date of January 10 of this year? A. Yes, sir, I was.

Q. Did you have occasion to go to the vicinity of Unity Farm that morning? A. Yes, sir, I did.

Q. What time did you receive the call? A. Approximately eight a.m.

Q. Where were you at that time? A. At home.

Q. What did you do upon receipt of the call? A. I finished dressing and went to my patrol car.

Q. And then where did you go? A. I drove out to U. S. 50 Highway at the north edge of Lee's Sum-
120 mit, Missouri.

Q. And when you got to Highway 50, what did you do? A. I turned north on U. S. Highway 50.

Q. Just tell the Court and jury what you did and what you saw? A. At that time I drove north in the northbound lane of U. S. Highway 50 to a point approximately six-tenths of a mile south of the junction of U. S. 50 and Colborn Road. At that time I saw a man come from the east side of the highway up the shoulder—up the drainage ditch and to the shoulder of the highway, and he started walking north on the shoulder.

Q. When you first saw this man what direction was he headed? A. He was headed west.

Q. Going across this drainage ditch? A. Yes.

Q. Then he turned north, you say, is that correct? A. As he got up onto the level of the pavement at the shoulder he turned and started walking north on the shoulder.

Q. What did you do then? A. I pulled the patrol car over behind him and opened the door and stepped out, and as I did this man turned around and faced the patrol car.

Q. Who was this man? A. Bobby Fred Ashe.

Q. What did you do when you saw him? A. At this time Mr. Ashe made a movement back behind his
121 back. I was just coming out from behind my door and I pulled the service pistol at that time and ordered him to put his hands over his head, that he was under arrest.

Q. Did he do that? A. Yes.

Q. All right. Then what did you do? A. I handcuffed him and searched him and placed him in my patrol car.

Q. When you searched him did you find anything at that time? A. No.

Q. What kind of search did you conduct? A. I searched for a weapon or any lethal instrument.

Q. By the way, is the man you arrested in the courtroom today? A. Yes, sir.

Q. Point him out? A. He is sitting right here (indicating).

Q. Is there anything different about his appearance today as contrasted from the day you arrested him? A. Yes.

Mr. Costello: I object to that, Your Honor, as being immaterial, wholly immaterial.

The Court: Are you endeavoring to go into his appearance or identity?

Mr. Furry: Identity and the change—I can ask the question in a different way.

Q. (By Mr. Furry) Trooper Ferguson, describe
122 the defendant, how he was dressed and his appearance at the time you arrested him? A. At the time I arrested him he was dressed in a white dress shirt that was open at the collar. It had french cuffs and no cuff links, they were hanging open. He had on a pair of dress pants. Of course, his hair was long and he had blood down the front of his shirt, that had dripped down the front of this white shirt. He had a lacerated tongue. And on the right back part of the shirt, at the flat portion of the back, there was a large stain that appeared to be manure, cow manure or horse manure. He gave the appearance of having walked some distance hurriedly. His hair was unkempt and he was breathing hard and sticking his tongue out because of this laceration. And he showed me the stitches. I saw some sutures there.

Q. All right. What did you do with the defendant then? A. When?

Q. What did you do with him there at the time after you placed him under arrest and made your search? A. I took him to the Unity Farm intersection where I contacted the officer in charge of the State Police there and he instructed me to take him back to Troop A headquarters at Lee's Summit and I took him there.

Q. That is what you did? A. Yes.

(State's Exhibit Number 24 was marked for iden-
123 tification.)

Q. Trooper Ferguson, I hand you what has been marked State's Exhibit Number 24 and ask you to identify this photograph, if you can, sir? A. Yes, that is a photograph of U. S. 50 Highway looking north in the northbound lane of Highway 50, the east shoulder, and Unity Tower in the rear, and myself standing on the shoulder.

Q. Do the physical objects as shown in this photograph fairly and accurately portray the conditions that were there the morning of January 10? A. Yes, they do.

Mr. Furry: I offer in evidence State's Exhibit Number 24.

Mr. Costello: I object to it as being immaterial, Your Honor. The witness's description is all that is needed.

The Court: Overruled.

Mr. Costello: Exception.

(State's Exhibit number 24 was received in evidence.)

Q. (By Mr. Furry) Trooper Ferguson, there is a man standing there in the photograph, is that correct? A. Yes.

Q. Is that yourself? A. Yes, sir.

Q. What does that point depict on the photograph? A. That is the location where I arrested Bobby Ashe.

Q. And you described a ditch to us previously. Is that shown in this photograph? A. Yes, this ditch here, and it continues on here (indicating).

124

Q. And Unity Tower is shown in this photograph, is it not? A. Yes, it is right here.

Q. And this slab here, what is that? A. That is U. S. 50.

Q. This was the point where you picked up this defendant, is that right? A. Yes, sir, that is right.

(State's Exhibit Number 25 was marked for identification.)

Q. (By Mr. Furry) Trooper Ferguson, I hand you State's Exhibit Number 25 and ask you if you can identify that? A. Yes, this is the shirt that Bobby Ashe was wearing at the time the arrest was made.

Q. At the time you picked him up? A. Yes.

Q. Do you recognize these slacks? A. Yes, that is the slacks he was wearing.

Mr. Furry: I offer in evidence State's Exhibit Number 25.

Mr. Costello: I object to it as being immaterial, Your Honor.

The Court: Overruled.

(State's Exhibit Number 25 was received in evidence.)

Q. (By Mr. Furry) Now, you have referred to a stain on the rear of the shirt. Will you point that out
125 to the jury? A. Yes, sir. This is the stain here on the back of the shirt.

Q. And you identified that stain as being made by what, sir? A. Manure. Horse manure or cow manure.

Q. By the way, what was the temperature out there that morning? A. It was cold. It was a winter morning, January 10. I don't know exactly what the temperature was. It was in the thirties or below.

Mr. Furry: I believe that is all. Thank you, sir.

Cross Examination

By Mr. Costello:

Q. What time was it that you arrested Ashe? A. Between 8:15 and 8:20 a.m.

Q. You were in a regular Highway Patrol car? A. Yes, sir, I was.

Q. Marked as a State Highway car and bearing a red light on the top? A. Yes, sir.

Q. Easily identified as an emergency vehicle? A. Yes, sir, that is right.

Q. You had no report of any of these men that committed this hold-up having blood on their clothes, did you? A. No, sir, I didn't.

Q. You found no money, I believe, on Ashe, when you conducted your search? A. No, sir, I didn't.

Mr. Costello: I think that is all.

(Witness excused)

126 **Donald P. Buehler,**

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. Donald P. Buehler, Lee's Summit, Missouri.

Q. Your occupation? A. State Patrolman.

Q. How long have you been on the Patrol? A. Five years.

Q. Trooper Buehler, did you have cause to make a search on January 10, 1960, in the area of Unity Farm? A. I did.

Q. Did you find any object at that time? A. Yes, I found a blue shirt hanging on a weed approximately fifty feet from the highway.

Q. By the way, how far was that? Did you measure any distance there? A. It was approximately four-tenths of a mile south of Colborn Road on 50 Highway on the east side of the road.

(State's Exhibit Number 26 was marked for identification.)

Q. Trooper Buehler, I hand you State's Exhibit Number 26 and ask you to take a look at it and identify it
127 for us, if you can? A. This is the shirt I found.

Q. Now, on this shirt, sir, can you tell us—

Mr. Costello: I object to that. The exhibit speaks for itself.

The Court: Sustained.

Q. (By Mr. Furry) Did this shirt appear in the same condition it is now as at the time you picked it up? A. Yes.

Q. Was there anything on this shirt?

Mr. Costello: I object to that, Your Honor, for the same reason.

The Court: Just a minute.

Mr. Furry: I am asking if there is anything on the shirt.

The Court: I think you'd better offer the shirt before you proceed further.

Mr. Furry: I offer into evidence State's Exhibit Number 26.

Mr. Costello: The defendant was not present when you found this?

The Witness: No.

Mr. Costello: I am going to object to it as being too remote, immaterial.

The Court: Have you inquired of this man when he found this? If you did, I missed it.

128 Q. (By Mr. Furry) What time did you find this?

A. This was approximately two-thirdy in the afternoon on January 10, 1960.

The Court: It was found where?

The Witness: It was found about fifty foot east of Highway 50, approximately four-tenths of a mile south of Colborn Road.

(Whereupon the following proceedings were had and entered of record IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY.)

Mr. Furry: Your Honor, this shirt was found two-tenths of a mile from where this defendant was arrested. The only thing that makes it significant is on the back there is a stain on here which I believe the Officer will testify was caused by manure and had the odor of it, and it corresponds directly to the shirt the defendant was wearing at the time.

The Court: The objection is overruled.

Mr. Costello: Exception.

(State's Exhibit No. 26 was received in evidence.)

(Whereupon the following proceedings were had and entered of record IN THE PRESENCE AND HEARING OF THE JURY.)

Q. (By Mr. Furry) This stain or marking on the shirt, can you tell the Court and jury what that is, if you know? A. At the time I picked the shirt up it had a strong odor of manure on the right shoulder in the back.

129 Q. As it appears here today? A. Yes.

(State's Exhibit Number 27 was marked for identification.)

Q. (By Mr. Furry) Trooper Buehler, I hand you State's Exhibit Number 27 and ask you to take a look at it and can you identify the photograph for us? A. That was a photograph taken by Trooper Place at the scene where I found the shirt.

Q. Do the objects as they appear in this photograph, are they the same as they were on the morning of January 10? A. Yes.

Q. There is an individual standing there, is that correct? A. Yes.

Q. Who is that? A. That is myself.

Mr. Furry: I offer in evidence State's Exhibit Number 27.

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130 (State's Exhibit Number 27 was received in evidence.)

Q. (By Mr. Furry) The person standing in the photograph here is yourself? A. Yes.

Q. Where was it you found the shirt? A. On this particular weed to my immediate left (indicating). I have one of the parts of the limb in my hand.

Q. Can you see the buildings of Unity in this photograph? A. Yes.

Q. Will you point them out for the jury, please? A. They are just to my left. Back in the background.

Q. That is looking what direction? A. That is looking almost due north.

131 Q. Where is the point where you found the shirt in relation to this, Exhibit Number 24? A. The place where I found the shirt is north of this exhibit here.

Q. About how far? A. About two-tenths of a mile.

Q. That would be on up the highway, is that correct? A. Yes, farther north.

Mr. Furry: You may inquire.

Mr. Costello: No questions.

(Witness excused)

Joseph L. Murphy.

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. State your name and address, please, sir? A. Joseph L. Murphy, 4051 Baltimore.

Q. What is your occupation, Mr. Murphy? A. Chief draftsman, County Highway Engineer's office.

Q. How long have you been with the County Highway Engineer's Department? A. Fifteen years.

Q. How long have you been a draftsman? A. Forty years.

(State's Exhibit Number 28 was marked for identification.)

132 Q. (By Mr. Furry) Mr. Murphy, I hand you what has been marked State's Exhibit Number 28 and ask you to identify that, if you can? A. Yes. It is Sheet 14 of our Road Record Maps out of a set of thirty.

Q. Is that a record that is kept by the County Highway Engineer? A. Yes, it is.

Q. Kept in the usual and ordinary course of business? A. Yes.

Q. In whose care, custody and control is that kept? A. My care.

Q. And what area, generally, does that depict, sir? A. Oh, in the area of Unity Village in Lee's Summit.

Q. Is that map kept current? A. Yes, it is.

Q. Do the physical objects or lines as shown on there by the roads, are they in the same position as the map indicates? A. They are, yes.

Mr. Furry: I offer into evidence State's Exhibit Number 28.

Mr. Pohlmann: No objection.

(State's Exhibit Number 28 was received in evidence.)

Q. (By Mr. Furry) Mr. Murphy, first of all, just show the jury generally what this map is. What is this double line running down here from north to south? A. U. S. Highway 50.

Q. By the way, this indicates north, does it not?

133 A. That is right.

Q. And what road is this running east and west? A. That is what we call Bannister to 50 and Colborn Road east of 50.

Q. Is the Unity Tower placed on this map? A. Yes, it is indicated right at this point (indicating).

Q. By that red "T", is that right? A. Yes, sir.

Q. Now, you have made some marks briefly on this map, have you not? A. Yes, I did.

Q. Now, referring to this mark which is made on the north side of Colborn Road east of Highway 50, can you tell us the distance from the intersection to that point in tenths of a mile, if you can? A. Seven-tenths of a mile.

Q. All right, sir. I will hand you this red pencil, would you mark in red "Number 20," by that? A. (Witness complies).

Mr. Furry: At this time for the record I am pinning State's Exhibit Number 20 which is a photograph of the area shown on the map to the map itself.

Q. (By Mr. Furry) Now, sir, referring to the point which is north of Colborn and Bannister Road here, can you tell us the distance from that point down to the intersection in tenths of a mile? A. One-half of a mile, five-tenths.

134 Q. All right, sir. Would you mark "21" by that point? A. (Witness complies).

Mr. Furry: At this time I will pin State's Exhibit Number 21 onto the map near that area.

Q. (By Mr. Furry) Now, this point over here is Noland Road? A. Noland Road, yes.

Q. Can you tell us the distance from this point down to the intersection of Noland and Bannister? A. Three-tenths of a mile.

Q. Would you make a mark "23," by that, sir? A. (Witness complies).

Mr. Furry: At this time I will pin State's Exhibit Number 23 to the plat.

Q. (By Mr. Furry) Now, there is a point right here on Bannister Road, can you tell us the distance from the intersection to this point? A. From 50?

Q. From Noland Road? A. It is three-tenths of a mile east of Noland Road.

Q. Would you put the mark "16," by that, please, in red pencil? A. (Witness complies).

Mr. Furry: At this time I pin State's Exhibit Number 16 to the plat.

Q. (By Mr. Furry) Now, sir, would you measure the distance from the intersection down to this point which is south of the intersection? A. Six-tenths of a

135 mile.

Q. Will you measure north two-tenths of a mile from that point and make an additional mark on the map on the east side of the highway there of that? A. (Witness complies).

Q. And would you circle that and put the number "27" by it, please? A. (Witness complies).

Mr. Furry: At this tim I will pin State's Exhibit Number 27 to the plat.

Q. (By Mr. Furry) N , on this mark, six-tenths of a mile south, would you m k the number "24"? A. (Witness complies).

Mr. Furry: I believe at is all, sir. Thank you very much.

Mr. Costello: No ques ns.

(Witness excused)

Ar r Graham.

called as a witness on behalf of the State, being duly sworn, testified as follow

Direct Examinati

By Mr. Furr

Q. Will you state yo name and address, please, sir?
A. Arthur L. Graham.
Q. Where do you live A. Grandview, Missouri.
Q. What s you ccupation? A. Truck driver.
136 Q. Are you acc inted with the defendant, Bobby Ashe? A. Yes.
Q. How long have yo nown him? A. All my life.
Q. Are you also acqu ted with John Edward Johnson?
A. Yes.
Q. How long have yo nown him? A. All my life.
Q. What is the relat ship?
Mr. Costello: I objec that, Your Honor, as being incompetent, no bearing tsoever in this case.
The Court: Overrule
Mr. Costello: Except
Q. (By Mr. Furry) his defendant, Bobby Ashe, and Johnson related in any ay? A. Half brothers.
Q. Now, directing yo ttention to the 9th day of January, were you the own f a car at that time? A. Yes.
Q. What kind of ca d you own? A. '59 Chevy.
Q. What color? A. k.
Q. What body style? Four door hardtop.
Q. Did you have yo r all during the day and night?
Mr. Costello: I obj to that as being immaterial, no connection with the def ant, that he ever saw the defendant on the 9th or anyt g about it.

The Court: Overruled.

Mr. Costello: Exception.

Q. (By Mr. Furry) Did you have your car all during the day of the 9th? That would be a Saturday, I believe? A. What day was the 9th, sir?

Q. Be on a Saturday? A. No, I didn't have it all day, no.

Q. What happened to it? A. Well, I loaned it to John Edward.

Q. John Edward who?

* * * * * * * * * *

Q. (By Mr. Furry) To whom did you loan your car on Saturday the 9th of January? A. John Edward.

Mr. Costello: Was it agreed my objection went to all his testimony?

The Court: Yes.

Q. (By Mr. Furry) I take it from your answer this was John Edward Johnson? A. Yes.

Q. What time did you loan it to him? A. I loaned it to him on Friday night.

Q. What happened on Friday evening? A. His car broke down at Harrisonville and I went to get him and loaned him my car to go home in.

Q. You went to Harrisonville to get Johnson? A. Yes.

Q. When you went there, tell us what you did? A. Just got in the car and come back.

Q. And you took him back to your home, is that correct? A. Yes.

Q. Did you go back down to Harrisonville the next day? A. Yes, on Saturday.

Q. Who was with you at that time? A. John Edward.

Q. And what did you do when you went to Harrisonville? A. He was going to sell his car. We took the license and spare tire off of it.

Q. You took the license and spare tire off of his automobile? A. That is right.

Q. What did you do with them? A. Put them in the trunk of mine.

Q. What kind of license was it that was taken off? A. Kansas.

Q. What color was it? A. It is yellow and blue, I believe.

(State's Exhibits Numbers 29 and 30 were marked for identification.)

Q. When you went down to Harrisonville and got these objects and put them in the trunk of your car, then what did you do? A. Come back to my house.

Q. And this was Saturday? A. Yes.

Q. About what time? A. Oh, it was afternoon.

Q. And then what happened? A. He took my car to go get his title to sell his old car.

Mr. Costello: I object to that, Your Honor, as being out of the presence of the defendant.

The Court: Overruled.

Mr. Costello: Exception.

Q. (By Mr. Furry) And when was the next time
141 that you saw your car? A. On Tuesday at Harrisonville.

Q. Tuesday? A. Yes. I mean at Lee's Summit. Excuse me.

Q. Be the following Tuesday, is that correct? A. Yes.

Q. All right, sir. I hand you State's Exhibit 30 and ask you if you can identify that? A. Yes, that is my car.

Q. Was that the condition it was in at the time it was loaned to Johnson? A. Looks like it, yes.

Q. And State's Exhibit Number 29? A. I say that is the same color. I don't know if it is the same license or not.

Q. You didn't take the numbers down? A. No.

Q. What letters was designated on the one that was taken off of Johnson's car? A. I couldn't say that.

Mr. Furry: At this time I offer into evidence State's Exhibit Number 30.

Mr. Costello: I am going to object to it as being immaterial. No connection shown with the defendant.

The Court: Overruled.

(State's Exhibit Number 30 was received in evidence.)

Mr. Furry: I believe that is all.

Cross Examination

142 By Mr. Costello:

Q. None of the times you have testified to was Bobby Ashe present? A. No, sir.

Q. He didn't go to Harrisonville with you and Johnson? A. No, sir.

Q. He wasn't present when what has been marked State's Exhibit Number 29 was taken from the car? A. No, sir.

Q. Was there any conversation between you and Johnson about committing any hold-up at Lee's Summit? A. No, sir.

Q. You never knew of any such plans? A. No. sir.

Mr. Costello: That is all.

Re-Direct Examination

By Mr. Furry:

Q. Do Ashe and Johnson always confine in their plans with you, sir? A. No.

Mr. Furry: Fine. Thank you, sir.

Re-Cross Examination

By Mr. Costello:

Q. You don't have any idea where Ashe might have been at the time all this was taking place at Harrisonville? A. No, I don't.

Q. They do confide some of their plans with you, don't they, from time to time? A. No, sir.

143 Q. Never did? A. No, sir.

Mr. Costello: Okay. That is all.

(Witness excused)

Leo Burrow.

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. State your name and address, please, sir? A. Leo Burrow, 3rd Street and 50 Highway, Lee's Summit.

Q. What is your occupation, sir? A. Repair shop and twenty-four hour tow service.

Q. What is the name of your business? A. Burrow Brothers Service.

Q. You operate that with your brother, is that right? A. Yes, my twin brother.

Q. Now, did you have occasion to go to a field at Unity Farm on the morning of January 10? A. Yes, I did, sir.

I received a call for both wreckers from the Highway Patrol.

Q. What time did you get out to the filed? A. That was around—I judge around twenty after five, quarter after five.

Q. What did you find on your arrival? A. Found two cars. An Oldsmobile and a '59 Chevrolet Impala.

144 Q. Do you remember where the Oldsmobile was? A. They was both sitting out in the field.

Q. What did you do when you got out there? A. Dewey Millsap gave us orders to pick the cars up and bring them to the shop and put them under lock and key.

Q. Did you do that? A. Yes.

Q. Did you disturb anything in or about those cars before taking them in? A. No, we did not.

Q. When you took them to the shop or place of business, what did you do with them? A. Put them inside the shop and locked them up.

Q. When was the next time the shop was open? A. When Patrolman Place called me. He came down around nine o'clock, quarter after nine.

Q. From the time you left after bringing the cars in until Trooper Bob Place got there the place was locked, is that correct? A. Yes, it was.

Q. Did you at any time disturb anything in the cars? A. No, sir.

Mr. Furry: Fine. Thank you very much, Mr. Burrow.

Cross Examination

By Mr. Costello:

Q. These cars were towed several miles, were they not? A. In the neighborhood of three miles.

145 Q. How did you tow them, by pulling them, or lifting them on a hoist, or what? A. We used the Ernest Holmes equipment. We picked the Oldsmobile up from the rear and the Chevrolet up from the front.

Q. So that they were towed on an angle? A. Yes, one end up in the air.

Q. Do you know whether that would have disturbed anything that was inside the car? A. No, sir, it would not.

Q. Don't they kind of bang against the tow truck somewhat? A. No, sir, not with Ernest Holmes equipment. They do not bang, sir.

Q. Bounce around a little bit? A. No, sir, not to speak of.

Q. Does the elevation cause them to shift? A. The elevation down there wouldn't cause it to shift, no, sir.

Q. How about when you jack them up? How high did you lift them? A. About a foot and a half.

Q. That is all the wheels were off the ground? A. Yes.

Q. How high was the body from the ground? Did it raise it up off the frame any? A. No, sir.

Q. Swing back and forth? A. No, sir, it does not swing back and forth. No, sir, not with Ernest Holmes
146 equipment, it does not, sir.

Q. Do you think it is possible anything might bounce around that was in the car? A. I doubt that very much, sir.

Q. It doesn't ride any better being towed down the highway with Ernest Holmes equipment than a car would ride driving? A. It all depends on the rate of speed you would be driving the car, sir.

Q. Ever drive a car and have things bounce off the seat? A. Not the speed that we go. We don't drive over thirty or thirty-five miles an hour with the tow car.

Q. Then nothing ever bounces off the seat? A. No, sir, they do not, sir.

Mr. Costello: Okay.

Mr. Furry: I take it you would recommend Ernest Holmes equipment, is that right?

The Witness: Very highly.

(Witness excused)

Robert G. Place,

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. Robert G. Place, Lee's Summit, Missouri.

147 Q. Your occupation? A. State Highway Patrolman.

Q. How long have you been on the patrol? A. About eighteen years.

Q. And what is your present assignment out there? A. I am assigned to Troop A as an evidence technician.

Q. What is the job of evidence technician? A. Well, when there is a crime committed I usually am called out to take photographs and fingerprints and those things.

Q. Did you have occasion on the 10th day of January to go to the Burrow Brothers Garage? A. Yes, sir, I did.

Q. About what time did you arrive? A. It was around nine o'clock, I would say.

Q. When you get there, what happened? Just tell us what you did? A. Well, there was two cars there. There was a black '59 Chevrolet Impala, and I examined this car for fingerprints and any other evidence. I took photographs of fingerprints which I found on the back deck of the trunk which were left by the dust that was on the trunk lid. There was a pair of shoes sitting underneath the steering wheel of the car down on the floorboard. We opened the trunk of the car, there was a Kansas license plate in there, WY68744.

Mr. Costello: I object to that as being immaterial, prejudicial, no showing it is connected to the defendant
148 in any way.

The Court: Overruled.

Mr. Costello: Or ever was in his knowledge at the time this conspiracy existed.

The Court: Overruled.

Mr. Costello: Exception.

Q. (By Mr. Furry) What did you find in the trunk of the Chevrolet? A. A Kansas license plate, WY68744. There was a spare tire and wheel there, and possibly some other tools and things. I also examined a '52 Oldsmobile, green Oldsmobile, which was in the garage also.

Q. Before we get on to the Oldsmobile, sir, I hand you what has been marked State's Exhibit Number 29 and ask you if you can identify that, sir? A. That is the Kansas license plate that we found in the trunk of the Chevrolet Impala.

Mr. Furry: At this time I offer in evidence State's Exhibit Number 29.

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149 (State's Exhibit Number 29 was received in evidence.)

(State's Exhibit Number 31 was marked for identification.)

Q. (By Mr. Furry) Trooper Place, I hand you State's Exhibit Number 31 and ask you to identify that, if you can. The inside contents of that envelope? A. This is a negative of one of the photographs that I took of the fingerprints that I found on the top of the deck of the trunk near the lock of the 1959 Chevrolet Impala there at Burrow Garage.

Mr. Costello: I object to this, Your Honor, and ask that it be stricken because there is no showing it is the defendant's fingerprint.

The Court: He hasn't said whose it was yet.

150 Mr. Costello: It makes no difference. There is no connection with this defendant and never will be.

The Court: Overruled.

Mr. Costello: Exception.

(State's Exhibit No. 31 was received in evidence.)

Q. (By Mr. Furry) What did you do with this, sir? A. That negative?

Q. Yes. A. I took it to Mr. Hines of the Kansas City Police Department and turned it over to him.

Q. That is Leon Hines over at the laboratory? A. Yes, sir.

Q. All right. Now then, you say you examined the 1952 Oldsmobile, did you not? A. Yes, sir.

Q. Tell us what you found. A. Well, I examined the 1952 Oldsmobile on the outside. I also looked into the front seat on the left-hand side, which would have been on the driver's side, and I could see a pile of clothing in about the center of the front seat there, and that clothing consisted of four pair of trousers, and a maroon jacket. There was also a sack there that had a carton—I think a six pack of beer that was beside the clothing there. I took a photograph of the clothing as it appeared there in the front seat of the '52 Oldsmobile. Later I went around on the other side, the right side of the Oldsmobile, and opened the door and I removed the clothing from the

151 seat there, and underneath and back between the back of the seat and the bottom of the seat there were two revolvers.

Q. Describe the revolvers? A. One of these was a Smith and Wesson revolver. It had four loaded cartridges in it. The other was a black .38 caliber, I believe it is a Japanese make. I am not positive about that. And it was loaded with five .38 caliber cartridges.

Q. All right, sir. I hand you State's Exhibit Number 9, which is the dark colored revolver, and Exhibit 10, which is the chrome plated revolver, and ask you to identify those, if you can? A. This is one of the revolvers that I found in the seat of the '52 Oldsmobile there.

Q. You are referring to State's Exhibit Number 9, the black revolver? A. Yes.

Q. What about State's Exhibit Number 10? A. This is the nickel plated Smith and Wesson revolver that I found in the seat of the car there.

Mr. Furry: At this time I reoffer into evidence State's Exhibits Number 9 and 10.

• • • • • • • • • • •

152 (State's Exhibits numbers 9 and 10 were received in evidence.)

(State's Exhibit Number 32 was marked for identification.)

Q. (By Mr. Furry) Trooper Place, I hand you what has been marked State's Exhibit Number 12 and ask you if you can identify that? A. This is a photograph that I made from the left part of the front seat of the '52 Oldsmobile at Burrow Garage there.

Q. Do the articles and objects that appear in this photograph fairly and accurately portray what you saw there that morning? A. Yes.

Q. All right, sir. Now, State's Exhibit 32, I will ask you to identify that, sir, if you can? A. This is a photograph that I made from the right side of the front seat of the car there showing the guns and the hat and

153 so forth in the seat.

Q. All right, sir. And State's Exhibit Number 13. A. That is a photograph that I made from the left side of the rear seat of the '52 Oldsmobile.

Q. All right, sir. Do all of these three photographs fairly and accurately portray what you saw there that morning when you took these photographs? A. Yes, sir.

Mr. Furry: I offer into evidence State's Exhibits 12, 13 and 32.

Mr. Costello: You don't know what the condition of these cars were at four o'clock that morning, do you?

The Witness: No, sir.

• • • • • • • • • • •

(State's Exhibits Numbers 12, 13 and 32 were re-
154 ceived in evidence.)

Q. (By Mr. Furry) Now, State's Exhibit Number 12, that was what? The view you got when you looked in from the left side of the car, is that correct? A. Yes.

Q. And the clothing was as indicated in the front seat? A. Yes.

Q. Then this photograph here, what is this object here that is shown? A. That was a paper sack that contained the six pack of beer.

Q. And this object? A. That was a gray straw hat.

Q. And these objects here? A. This was a red bandana handkerchief and this was a white—I believe a scarf or handkerchief.

Q. Where were these in relation to the clothes shown in State's Exhibit Number 12? A. They were away from the driver's side of the seat, here on the other side of the clothing, the clothing was on top of them, more or less.

Q. In other words, you had to remove the clothing to get this photograph, is that correct? A. Yes.

Q. Now, in State's Exhibit Number 13, that shows the rear seat of the car, is that correct? A. Yes, sir.

155 Q. There are some objects on the floor and up here on the seat. Tell us what those are, what you found in the back seat? A. Well, there is the light assembly from the dome light, and a coat, and a belt, and then I think there was a pair of binoculars here in the case. I think that is about all.

Q. This dome light, how does that work? Where was that located? A. It was on the floor of the car.

Q. That is the dome light that sets above everything inside? A. Yes, sir.

Q. How do you turn the dome light on and off? A. I don't know whether it has one on the pillar. Sometimes they have it up at the top. I don't know.

(State's Exhibit Number 33 was marked for identification.)

Q. I will hand you what has been marked State's Exhibit Number 33 for identification, and ask you to take a look at it and identify that if you can? A. That is a fingerprint card of inked fingerprints that have been taken.

Q. Is there a signature on the lower left hand side of that? A. Yes.

Q. What signature is it?

* * * * * * * * * *

156 Cross Examination

By Mr. Costello:

Q. You don't know when this dome light was taken down? A. No, sir.

Q. You didn't find any fingerprints on it? A. No, sir.

Q. Did you get any report from your—what do you call it, scientific bureau? A. Our laboratory.

Q. Is that where they test the fingerprints? A. Yes, sir.

Q. Did you get any report back from there on this fingerprint that you lifted? A. I didn't lift that.

Q. You obtained it? A. Yes, sir, I did.

Q. Who compared that down there, do you know? A. Sergeant Runkle. I sent the photograph, the print of the negative, to him.

Q. And your only knowledge of this was your investigation of the cars and other things for evidence, and I
157 believe you are the custodian? A. That is right.

Mr. Costello: I think that is all.

Re-direct Examination

By Mr. Furry:

Q. You made a search of the vehicles for other fingerprints? A. Yes, sir.

Q. Did you obtain any other fingerprints? A. I obtained some other fingerprints which I lifted by tape and powder and I photographed other fingerprints and palm prints on the car.

Q. Were they of any value? A. In my opinion they weren't at that time.

Mr. Furry: All right, fine. Thank you very much.

Re-cross Examination

By Mr. Costello:

Q. The fingerprint that you photographed, I believe that is what you said you did to it? A. Yes, sir.

Q. Could you ascertain how long that had been on the car? A. No, sir.

Q. Could it have been made on the 9th, say, that was on a Saturday before you examined the car, the day before? A. Yes, sir.

Q. If a man were lifting up the back to put a tire in it or something, could it have been placed there at that time? A. Yes, sir.

158 Mr. Costello: I think that is all.

Mr. Furry: That is all.

(Witness excused)

(Recess)

Otto Ray,

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Mr. Otto Ray, is that correct? A. That is right, Otto Ray.

Q. What is your job or profession? A. Deputy Sheriff up in jail.

Q. Jackson County? A. Jackson County.

The Court: Speak up so we can hear you.

Q. (By Mr. Furry) Mr. Ray, on January 10 of this year, did you have occasion to see this defendant, Bobby Ashe? A. Yes, sir, I did.

Q. Where was that? A. They brought him in from out in the County upstairs to the jail.

Q. About what time was that? A. I wouldn't say definitely just exactly what time it was, but I was on when they brought him in.

Q. Was it in the morning or afternoon? A. I believe it was in the afternoon.

159 Q. What did you do in connection with him? A. I opened the gate and the Deputies let him in and let the other fellows in with him. Unlocked the gate and he was sent to the desk to be booked in.

Q. Who booked him in? A. Mr. Mallory.

Q. What did you do? A. After Mr. Mallory booked them in, I shook them to get down to get ready to go in the cage.

Q. What does that mean? A. That means all your property must be left at the desk and put in an envelope that is their property.

Q. What did you take from this man? A. I took his property that he had on him.

Q. What did he have on him? A. Well, he had some bills, and I think a billfold, and one hundred and thirty dollars.

Q. One hundred and thirty dollars? A. Yes, sir.

Mr. Furry: That is all I have.

Cross Examination

By Mr. Costello:

Q. Who is the barber up in the jail? A. Barber?

Q. Yes? A. I don't know. We have one there in the kitchen. Johnny Darling.

Q. Do you have any other barbers up in the tank?

160 A. There is boys in each tank cuts hair, inmates' hair.

Q. Do you know whether or not they are qualified barbers? A. I wouldn't say that.

Mr. Furry: I object to the qualifications of the prisoners in the County Jail for being barbers. I think that is immaterial.

The Court: Sustained.

Mr. Costello: They obviously are not.

Q. (By Mr. Costello) Do you know what became of that money you took off Ashe? A. No, sir, I don't have anything to do with it after I turn it in.

Mr. Costello: I believe that is all.

(Witness excused)

Mr. Furry: Your Honor, I would like to pass these exhibits to the jury, the shotgun and the two pistols.

The Court: Very well.

(Whereupon the following proceedings were had and entered of record IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY.)

• • • • • • • • • • •

161 Mr. Costello: Defendant excepts to all of them.

Mr. Furry: Your Honor, the State of Missouri rests.

(STATE RESTS)

The Court: Is it your intention, Mr. Costello, to offer any testimony on behalf of the defendant?

Mr. Costello: No, Your Honor.

The Court: Let the record show that at the close of the State's evidence, the defendant files a Motion for Verdict of Acquittal, which is by the Court overruled. The defendant has announced they have have no intention of putting on any evidence, and the State has no rebuttal, as I understand.

162 Mr. Furry: No, sir.

The Court: Defendant files a Motion for a Directed Verdict of Acquittal at the close of all the evidence, which is by the Court overruled.

(Whereupon the following proceedings were had and entered of record IN THE PRESENCE AND HEARING OF THE JURY.)

(Instructions One through Seven were thereafter read by the Court to the jury.)

162a INSTRUCTION No. 1

The Court instructs the jury that if you believe and find from the evidence in this case, beyond a reasonable doubt, that at the County of Jackson and State of Missouri, on the 10th day of January, 1960, the defendant herein, BOB FRED ASHE, alias BOBBY FRED ASHE, either alone or knowingly acting in concert with others, did then and there with force and arms in and upon one Don Knight, unlawfully and feloniously make an assault and took and carried away any money from his person or in his presence and against his will, by force and violence to his person, or by putting him in fear of some immediate injury to his person, with felonious intent to convert the same to his own use, with-

out any honest claim to said money on the part of the defendant and with intent to permanently deprive the said Don Knight of his ownership and without the consent of the said Don Knight, if such be your finding, then you will find the defendant guilty of Robbery, First Degree, and so find in your verdict.

And, unless you find the facts to be as above stated, you are instructed to acquit the defendant of Robbery, First Degree.

"Feloniously" as used in these instructions means wickedly and against the admonition of the law, that is, unlawfully.

Given
JMK

162b INSTRUCTION No. 2

The Court instructs the jury that if you do not believe and find from the evidence in this case, beyond a reasonable doubt, that at the County of Jackson and State of Missouri, on the 10th day of January, 1960, the defendant herein, BOB FRED ASHE, ALIAS BOBBY FRED ASHE, either alone or knowingly acting in concert with others, did then and there with force and arms in and upon one Don Knight, unlawfully and feloniously make an assault and took and carried away any money from his person or in his presence and against his will, by force and violence to his person, with felonious intent to convert the same to his own use, without any honest claim to said money on the part of the defendant and with intent to permanently deprive the said Don Knight of his ownership and without the consent of the said Don Knight, if such be your finding, then you will acquit the defendant of Robbery, First Degree, and so find in your verdict.

Given
JMK

162c INSTRUCTION No. 3

The Court instructs the jury that all persons are equally guilty who act together with a common intent in the commission of a crime, and a crime so committed by two or more persons jointly is the act of all and of each one so acting

The Court instructs the jury that when two or more persons knowingly act together in the commission of an unlawful act or purpose, then whatever either does in furtherance of such unlawful act or purpose is in law the act and deed of each of such persons.

Given
JMK

162d INSTRUCTION No. 4

The Court instructs the jury that the intent with which an act is done may be proved by direct and positive evidence, or it may be inferred from all the facts and circumstances surrounding and attending the act and must be determined by the jury from the evidence given in the case.

Given
JMK

162e INSTRUCTION No. 5

The Court instructs the jury that the law presumes the innocence and not the guilt of the defendant, and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence in the case, when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt.

The Court instructs the jury that if they have a reasonable doubt of defendant's guilt, they should acquit, but a doubt to authorize an acquittal on that ground ought to be a substantial doubt touching defendant's guilt and not a mere possibility of defendant's innocence.

Given
JMK

162f INSTRUCTION No. 6

The jury are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony.

In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct

and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, the motives actuating the witness in testifying, the witness' relation to, or feelings for or against the defendant, or the alleged injured party, the probability or improbability of the witness' statements, the opportunity the witness had to observe and to be informed as to the matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All those matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit and the testimony of each witness such value and weight as you deem proper.

Given
JMK

162g INSTRUCTION No. 7

Form of Verdict

If the jury find the defendant, BOB FRED ASHE, ALIAS BOBBY FRED ASHE, guilty of Robbery, First Degree, you may use the following form:

We the Jury, find the defendant, BOB FRED ASHE, ALIAS BOBBY FRED ASHE, guilty of Robbery, First Degree.

.....
Foreman

If the jury find the defendant, BOB FRED ASHE, ALIAS BOBBY FRED ASHE, not guilty of Robbery, First Degree, you may use the following form:

We, the Jury, find the defendant, BOB FRED ASHE, ALIAS BOBBY FRED ASHE, not guilty.

ROSCOE L. BENNETT
Foreman

YOUR ONE VERDICT MUST BE UNANIMOUS, MUST BE SIGNED BY ONE OF YOUR NUMBER AS FOREMAN AND SHOULD BE WRITTEN UPON A SEPARATE SHEET OF PAPER AND NOT UPON ONE OF THESE INSTRUCTIONS.

Given
JMK

162h Clerk's Certificate to foregoing papers omitted in printing.

162i (Thereafter, counsel for the State made his closing argument to the jury; counsel for defendant waived his closing argument.)

(The jury after hearing all the evidence, the reading of the Instructions of the Court, argument of counsel for the State, said jury retired to the jury room to deliberate in the custody of John Robinson, Deputy Sheriff, who was duly sworn according to law to take charge of the same, to consider their verdict, and after due deliberation, said jury returned into open court with the following verdict, in words and figures as follows, to wit:)

"We, the jury, find the defendant, Bob Fred Ashe, alias Bobby Fred Ashe, not guilty due to insufficient evidence.

Foreman of Jury
(Signed) Roscoe L. Bennett."

163 [Reporter's Certificate to foregoing transcript omitted in printing.]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,
AT KANSAS CITY, DIVISION NO. 3,
DESIGNATED AS CRIMINAL DIVISION "A"

No. 29768

STATE OF MISSOURI, *Plaintiff-Respondent,*

vs.

BOB FRED ASHE, alias BOBBY FRED ASHE,
Defendant-Appellant.

1 Now on this day comes the Prosecuting Attorney and files the following Informations in open court, to wit: Among which is C-29768 State of Missouri vs. Bobby Fred Ashe and Eric Lafe Larson and John Edward Johnson, Robbery, First Degree.

(Robbery, First Degree)

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, January Term, 1960, in DIVISION No. 3 Thereof, designated by the rules of said Court as CRIMINAL DIVISION A

State of Missouri

vs.

Bobby Fred Ashe and
Eric Lafe Larson and
John Edward Johnson

Information—Filed February 3, 1960

Now comes Sam Modica, Assistant Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon his oath informs the Court, that Bobby Fred Ashe and Eric Lafe Larson and John Edward Johnson whose Christian names in full unknown to said Assistant Prosecuting Attorney, on the 10th day of January, 1960, at the County of Jackson and State of Missouri, with force and arms, in and upon one Ray Roberts unlawfully and feloniously did make an assault, with a dangerous and deadly weapon, to wit: revolvers, loaded with gunpowder and leaden balls, and one (1) watch, Clinton, 17 jewel, with calendar face, yellow gold, of the value of Eighty-five ($85.00) Dollars; one (1) 1½ carat diamond ring, value of

One Thousand Five Hundred ($1,500.00) Two Hundred ($200.00) Dollars in lawful money of the United
2 States; of the aggregate value of One Thousand Seven Hundred Eighty-five ($1,785.00) Dollars, the money, goods, chattels and personal property of the said Ray Roberts, from the person and in the presence and against the will of the said Ray Roberts then and there by force and violence to the person of the said Ray Roberts and by putting the said Ray Roberts in fear of an immediate injury to his person, feloniously did rob, steal, take and carry away; against the peace and dignity of the State.

(Signed) Sam Modica
Assistant Prosecuting Attorney

• • • • • • • • • • •

3 No. C-29768

INFORMATION

STATE OF MISSOURI

Against

Bobby Fred Ashe and
Eric Lafe Larson and
John Edward Johnson

Charged With Robbery, First Degree

Filed February 3, 1960

JOHN J. MCFADDEN, Clerk,

By (Signed) Agnes Comer, D.C.

WITNESSES:

John & Viola Gladson, 307 East Orchard, Lee's Summit, Mo.
Jerry W. Freeman, 10-E Highway, Rt. 2, Box 182-A, Lee's Summit, Mo.
Orville Goodwin, 4 West Forest, Lee's Summit, Mo.
Charles Westerfield (guard), Unity Village, Highway 50, Lee's Summit, Mo.
Arthur Graham, 14721 Fuller, Grandview, Mo.
Donald Knight, 5th & Grand, Lee's Summit, Mo.
4 Richard McClenden, L19 Lake View, Lee's Summit, Mo.
Ray Roberts, Rt. 4, Lee's Summit, Mo.

OFFICERS:

Tpr. T. Ferguson, 5013 E. Third, Lee's Summit, Mo.
Sgt. M. B. Roberts, 12530 Grandview Rd., Grandview, Mo.
D/s Claude Grantham, Greenwood, Mo.
D/s Robert Copeland, Greenwood, Mo.
Lt. Harry Nesbitt, Jackson County Sheriff's Off.
Tpr. D. E. Millsap, 5th & Grand, Lee's Summit, Mo.
Sgt. E. A. Butler, 1009 West First, Lee's Summit, Mo.
Sgt. Carl Foster, 2903 Overton, Indep., Mo.
Robert Bretz, c/o Bob's Auto Parts, Highway 71 South, Harrisonville, Mo.
Sgt. James Browning, 2719 Whitney Rd., Indep., Mo.
Off. Charles Gardner, Lee's Summit, Mo.
Lt. C. W. Keith, 412 Indep. Ave., Lee's Summit, Mo.
Charles Gardner, Lee's Summit, Mo. Police Dept.

5 **Arraignment—February 4, 1960**

Now on this day comes the Prosecuting Attorney, comes also the defendant, Bobby Fred Ashe, in person and in the custody of the Sheriff, in open Court, thereupon the Court informed said defendant of the nature of the charge against him, and the punishment therefor, and of his right to counsel, and explained wherein the exercise of said right might be of benefit to said defendant, and after interrogating said defendant, the Court finds that defendant is mentally able and sufficiently informed to decide his need for counsel, and the Court offered to appoint counsel for said defendant to conduct his defense, but defendant waived such right to counsel, thereupon said defendant being arraigned before the Court for plea, enters a plea of not guilty to the charge of Robbery First Degree; thereupon the Court orders that the trial of this Cause be set for trial on the 29th day of February, 1960, and that said defendant be held to bail in the sum of Five Thousand ($5,000.00) Dollars.

Now said defendant makes oral application for severance, which is by the Court sustained.

• • • • • • • • • •

6 February 29, 1960.

Now on this day, at the request of the defendant, the Court ordered that this cause be continued for the term and set for trial on the 14th day of March, 1960, same being the first day of the March Term, 1960.

March 14, 1960.

Now on this day it is ordered by the Court that this cause be reset for trial on the 18th day of April, 1960.

• • • • • • • • • • •

May 2, 1960.

Now on this day it is ordered by the Court that this cause be reset for trial on the 9th day of May, 1960, the same being the first day of the May Term, 1960.

May 9, 1960.

Now on this day it is ordered by the Court that this cause be reset for trial on the 16th day of May, 1960.

May 23, 1960.

Now on this day it is ordered by the Court that this cause be reset for trial on the 31st day of May, 1960.

7 May 31 1960.

Now on this day it is ordered by the Court that this cause be reset for trial on the 13th day of June, 1960.

June 13, 1960.

Now on this day it is ordered by the Court that this cause be reset for trial on the 20th day of June, 1960.

• • • • • • • • • • •

Amended H.C.A. Information—Filed June 21, 1960

STATE OF MISSOURI

vs.

Bob Fred Ashe, alias Bobby Fred Ashe

In the Circuit Court of Jackson County, Missouri, at Kansas City, May Term, 1960. In Division Number 3 thereof, designated by the rules of said Court as Criminal Division A.

Now comes Theodore J. Furry, Assistant Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon his oath informs the Court, that Bob Fred Ashe, alias Bobby Fred Ashe, whose Christian name in full is unknown to said Assistant Prosecuting Attorney, late of the county aforesaid, on the 18th day of August, 1950 in the District Court of the United
8 States for the Western District of Missouri, Western Division, the defendant Bob Fred Ashe, alias Bobby Fred Ashe, was convicted upon his plea of guilty to a violation of Section 659, Title 18, U.S.C., the offense of theft from an interstate shipment and sentenced to a term of two (2) years imprisonment, and that on the 4th day of December, 1952, the defendant Bob Fred Ashe, alias Bobby Fred Ashe, was in the Circuit Court of Jackson County, in the State of Missouri, found guilty of crimes of Burglary 2nd Degree and Tampering with a Motor Vehicle and was sentenced to a term of imprisonment of two (2) years on each of the two (2) charges said terms of imprisonment to run concurrently; that thereafter the defendant was received at the Missouri State Penitentiary on January 12, 1953, and was incarcerated therein until he was discharged by commutation of sentence on March 12, 1954, that thereafter Bob Fred Ashe, alias Bobby Fred Ashe, on the 10th day of January, 1960, at the County of Jackson and State of Missouri, with force and arms in and upon one Ray Roberts unlawfully and feloniously did make an assault with a dangerous and deadly weapon, to wit: revolvers, loaded with gunpowder and leaden balls, and one (1) watch, Clinton, 17 jewel with calendar face, yellow gold of the value of Eighty-five ($85.00) Dollars; one (1) 1½ carat diamond ring of the value of One Thousand Five Hundred ($1,500.00) Dollars; Two Hundred ($200.00) Dollars in lawful money of the United States, of the aggregate value of One Thousand Seven Hundred Eighty-five
9 ($1,785.00) Dollars; the moneys, goods, chattels and personal property of the said Ray Roberts, from the person and in the presence and against the will of the said Ray Roberts then and there by force and violence to the person of the said Ray Roberts, and by putting the said Ray Roberts in fear of an immediate injury to

his person feloniously did rob, steal, take and carry away; against the peace and dignity of the State.

(Signed) THEODORE J. FURRY
Assistant Prosecuting Attorney

* * * * * * * * * *

JOHN J. McFADDEN, Clerk of the Circuit Court, Criminal Division of Jackson County, Missouri.

By .....Deputy

10 No. C-29768

AMENDED H.C.A. INFORMATION

STATE OF MISSOURI

Against

Bob Fred Ashe, alias Bobby Fred Ashe

Charged With Robbery, 1st Degree

Filed June 21, 1960

JOHN J. McFADDEN, Clerk.

By ..... D.C.

WITNESSES:

John & Viola Gladson, 307 E. Orchard, Lee's Summit
Jerry W. Freeman, 10 E. Highway, Rt. 2, Box 182A
Orville Goodwin, 4 West Forest, Lee's Summit
Donald Knight, 5th & Grand, Lee's Summit, Mo.
Richard McClenden, L19 LakView, Lee's Summit, Mo.
Ray Roberts, Rt. 4, Lee's Summit, Mo.
Charles Westerfield (Guard), Unity Village Highway 50, Lee's Summit, Mo.
Trooper D. P. Buehler, Troop A, Mo. Highway Patrol, Lee's Summit, Mo.
11 Otto Ray D/S Jackson County, Mo.
Herman Davis, Laboratory, K.C. Mo. P.D.
Arthur Graham, 14721 Fuller, Grandview, Mo.
Tpr. T. Ferguson, 5013 E 3rd, Lee's Summit
Sgt. M. B. Roberts, 12530 Grandview Rd., Brandview, Mo.
Lt. Harry Nesbitt, Sheriff's Patrol

Tpr. D. E. Millsap, 5th & Grand, Lee's Summit, Mo.
Sgt. E. A. Butler, 1009 W. 1st, Lee's Summit, Mo.
Sgt. Carl Foster, 2903 Overton, Indep., Mo.
Off. Charles Gardner, Lee's Summit, Mo.
Leo Burrows, c/o Burrows Garage, Lee's Summit, Mo.
A. C. Murphy, Lizzy Ann Trailer Court, Belton, Mo.
Trp. R. G. Place, Mo. Hwy. Patrol, Trp A., Lee's Summit
Leon Hines K.C. Mo. Police Lab.
Joe Murphy, Chief Draftsman, Off. County, Hwy. Engineer, Jack. Co. Crt. House

(File endorsement omitted)

12 June 20, 1960.

Now on this day comes Joseph Harrington, attorney for said defendant, and filed a Motion to Dismiss Autrefois Acquit.

"Motion To Dismiss Autrefois Acquit

COMES NOW THE defendant and states:

1. That on or about February 3, 1960, defendant was charged by information with the crime of first degree robbery; said charge being numbered C29766 in the Circuit Court of Jackson County, Missouri, and alleging that on or about January 10, 1960, defendant in company with Eric Larsen, Thomas Brown, and John Edward Johnson robbed one Don Knight by use of force and threat; that thereafter an amended information was filed and defendant Ashe was given a trial by jury in a court of competent jurisdiction and on a valid information; that on May 3, 1960, said defendant was found not guilty by the said jury.

2. That present at the time and place of said robbery in addition to the said Don Knight were John Gladson, Jerry Freeman, Orville Goodwin, Richard McClendon and Ray Roberts, who allegedly were also robbed by the defendant and others.

3. That the prosecuting attorney has filed five additional first degree robbery charges against defendant arising out of the same alleged acts by defendant and others on January 10, 1960, at the home of John Gladson in Lee's Summit, Missouri.

4. That during the trial of Charge No. C29766 in
13 Division No. 3 of the Circuit Court of Jackson County, Missouri, the trial judge ruled said robbery a conspiracy and admitted evidence of all of the robberies charged in the other information filed against defendant and arising out of the same alleged acts at the same time and place.

5. That defendant Ashe is charged by Information No. C29774 in the Circuit Court of Jackson County, Missouri, with the crime of stealing a motor vehicle belonging to Ray Roberts and allegedly used as a "getaway car"; that evidence of this alleged crime was also admitted at said trial.

6. That as a result of the above and foregoing actions by the State of Missouri, defendant has once been in jeopardy of all of the crimes charged against him numbered C29774, C29762, C29764, C29768, C29770 and C29772.

WHEREFORE, defendant, Bob Fred Ashe, prays that the Court dismiss the above charges numbered C29774, C29762, C29764, C29768, C29770 and C29772, and said defendant be discharged.

SUGGESTIONS IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AUTREFOIS ACQUIT

Defendant Bobby Ashe was tried for first degree robbery on Charge No. C29766 and acquitted on May 3, 1960. The additional charges all arose from the same transaction wherein six poker players were robbed in the Gladson recreation room. The above charged named Don Knight as the victim.

The court admitted evidence of everything that
14 occurred in said recreation room, what happened the day before, and the evidence of the theft of a car for the getaway.

The proof of the charges still pending will be exactly the same evidence as that introduced during the trial which resulted in defendant's acquittal.

> "Thus, if the evidence which is necessary to support the second indictment was admissible under the former, was related to the same crime, and was sufficient, if

believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar." 22 C.J.S. Sec. 279.

Missouri is a common law state, and as such the rule against double jeopardy prevails, and precludes a second conviction or acquittal for the same offense.

"Nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury." Constitution of Missouri, 1946, Art. 1, Sec. 19.

In the instant case, the State has split a cause of action and would attempt to prosecute the defendant piecemeal, a procedure barred by the courts of Missouri.

"But the rule is well settled that the State cannot split up a single crime and prosecute it in parts, and that a prosecution for any part of a single crime bars any further prosecution based upon the whole or any part of the same crime." State vs. Toombs, 34 SW 2d, l.c. 64.

The Toombs case is the latest and most comprehensive discussion of double jeopardy by the Missouri courts. It is cited with approval in State vs. Hicklin, 218 SW 2nd 564.

The State will no doubt rely on the Varner case at
15 329 SW 2nd 623. If the court will, please note Section 559.010, R.S. Mo. 1949, which provides "every murder" so that regardless of the number of persons killed in one act, each would be a violation of this section.

The State is also relying on the case of State of Missouri vs. Williams, 263 SW 195. There is a great distinction between said case and the instant case in that defendant Williams was tried February 20, 1923, on a charge of robbery in the first degree, was found guilty and his punishment assessed at imprisonment in the penitentiary for a term of twenty-five (25) years. On the following day, February 21, 1923, the defendant was again tried. The indictment in the second case was in two (2) counts, first count charged defendant with the shooting of one Thomas

Henry, the second count charged defendant shot said Henry while committing the crime of robbery. The State elected to go to trial on the second count of the indictment and dismissed as to the first count therein. The defendant was found guilty and the verdict of the jury read as follows:

> "We the jury find the defendant guilty of assault with intent to rob as charged in the indictment and assess his punishment at fifty (50) years' imprisonment in the State penitentiary. H. A. Beynon, Chairman."

The defendant contends that the Williams case is not in point in the present state of facts since Williams was convicted in one case of robbery in the first degree and in the second case of assault with intent to rob.

16 Defendant also relies on Section 556.240, V.A.M.S., which is as follows:

> "When the defendant shall be acquitted or convicted upon an indictment he shall not thereafter be tried or convicted of a different degree of the same offense nor for an attempt to commit the offense charged in the indictment or any degree thereof or any offense necessarily included therein, provided he could have been legally convicted or such degree or offense or attempt to commit the same under the first indictment."

In the latest Federal case touching upon former jeopardy, said case being Green vs. the United States, 78 Supreme Court, 221, and handed down in the year 1957, the Supreme Court states:

> "Idea underlying constitutional prohibition against double jeopardy is that the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty."

Defendant also relies on the case of State vs. Bockman, et al, 124 SW 2d 1205. The Supreme Court of Missouri in the Bockman case stated:

> "The theft of several articles of property belonging to different owners at the same time and from the same place constitutes in law but one offense.
>
> "Where cattle belonging to different owners were apparently claimed to have been stolen by defendants at the same time and place in Oregon County and transported into Carter County, a conviction of larceny in Carter County on cattle belonging to one owner could be pleaded in bar of subsequent prosecution in Oregon County for larceny of heifer belonging to another owner, notwithstanding that appeal from convicting in Carter County was pending at time of trial in Oregon County."

17 The State has already pointed out that the law on this present question makes a distinction between crimes involving property and a crime against the person. Defendant submits that there are no Missouri cases on this point.

18 **Transcript of Trial—June 20, 1960**

BE IT REMEMBERED that heretofore on Monday, June 20, 1960, this cause came on regularly for trial before the Honorable J. Marcus Kirtley, Judge of Division No. Three designated as Criminal Division A of the Circuit Court of Jackson County, Missouri, at Kansas City, and a jury.

Mr. Theodore J. Furry, Assistant Prosecuting Attorney for Jackson County, appeared for the Plaintiff.

The Defendant appeared in person and by counsel, Mr. Joseph A. Harrington.

(A jury was duly empaneled and selected to try this cause.)

* * * * * * * * * *

19 (Whereupon, the following proceedings were had and entered of record IN THE PRESENCE BUT OUT OF THE HEARING OF THE JURY:)

Mr. Harrington: Let the record show that the defendant in this case Bobby Fred Ashe files a Motion to Dismiss Autrefois Acquit, and asks the Court that he be allowed to argue this motion out of the hearing of this jury. A copy has been furnished the Prosecuting Attorney.

• • • • • • • • • • •

20 (Whereupon, the trial of this cause was adjourned until Tuesday, June 21, 1960.)

• • • • • • • • • • •

21 June 21, 1960

(Pursuant to adjournment of this cause on June 20, 1960, the following further proceedings relative to defendant's Motion to Dismiss Autrefois Acquit were had on June 21, 1960, OUT OF THE PRESENCE AND HEARING OF THE JURY.

Mr. Theodore J. Furry, Assistant Prosecuting Attorney for Jackson County, appeared for the Plaintiff.

The defendant was present in person and represented by counsel, Mr. Joseph A. Harrington.

The defendant presented evidence in support of said motion, as follows:)

Charles Modica,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Harrington:

Q. Will you state your name, please? A. Charles Modica.

Q. And where do you live, Mr. Modica? A. 226 Brooklyn.

Q. And where are you employed? A. Circuit Clerk's office.

Q. What is your title there? A. Clerk of the criminal court.

Q. As clerk of the criminal court, do you have charge of all the records pertaining to criminal cases tried in Jackson County? A. I have.

22 Q. Pursuant to a subpoena duces tecum, have you produced the records in the case of State of Missouri versus Bob Fred Ashe? A. I have.

Q. Case number C-29766, was there an information filed in that case? A. There was on the 4th day of February, 1960.

Q. May I have the information, please? When was the first information filed? A. On February 3, 1960.

Q. What was the title of the case and number of it? A. C-29766, State versus Bobby Fred Ashe, Eric Lafe Larson, and John Edward Johnson, charged with Robbery First.

(Defendant's Exhibit No. 1 was marked for identification.)

Q. I hand you what has been marked Defendant's E[illegible] 1 and ask you if that is an official document that is [illegible] your control as criminal clerk of Jackson County? A. [illegible]

Q. And what is that document? A. An information, amended information, filed against Bobby Fred Ashe charging him with robbery first degree under the Habitual Criminal Act, which was filed on April 29, 1960.

Q. What is the number of that case? A. C-29766.

Q. Do you also have the records as to the trial of that case, Mr. Modica? A. I have.

23 Q. When was the case tried? A. Our official records show the case was tried on May 2, 1960. That is when the jury was empaneled.

Q. Was the jury duly empaneled and sworn in that case? A. That is right.

Q. Does your record show that evidence was submitted to that jury? A. It was.

Q. Under the charge of robbery, first degree? A. Yes, under the Habitual Criminal Act.

Q. Does your record show what the verdict of the jury was? A. It does. On May 3, 1960, "We, the jury, find the defendant Bob Fred Ashe, alias Bobby Fred Ashe, not guilty due to insufficient evidence. Roscoe L. Bennett, Foreman."

Mr. Harrington: I offer in evidence the official records of the criminal clerk, Book 309, Page 164, which is the record pertaining to empaneling the jury and the swearing of the jury.

The Court: Any particular case?

Mr. Harrington: In the case of—and the hearing of the evidence—in the case of State of Missouri versus Bobby

Ashe, case number C-29766, which is a charge of robbery, first degree, under the Habitual Criminal Act.

We also offer in evidence the official records from the criminal clerk of Jackson County, Book 309, Page 165, entitled State of Missouri versus Bobby Fred Ashe
24 dated Tuesday, May 3, 1960, case number C-29766, charge of Robbery, First Degree, under the Habitual Criminal Act, and also offer the verdict of the jury which is as follows: "We, the jury, find the defendant Bob Fred Ashe, alias Bobby Fred Ashe, not guilty due to insufficient evidence. Signed Roscoe L. Bennett, Foreman."

Any questions?

Mr. Furry: No questions.

(Witness excused.)

Mr. Harrington: Now we have offered this evidence of the former trial of acquittal in support of the motion filed herein, Motion to Dismiss Autrefois Acquit, and it is the defendant's contention that defendant is in double jeopardy as the motion states because of his former acquittal.

(Whereupon, arguments were heard on the motion of defendant to dismiss autrefois acquit by the Court.)

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25 AFTERNOON SESSION.

(Whereupon, the following proceedings were had and entered of record IN CHAMBERS, OUT OF THE PRESENCE AND HEARING OF THE JURY.)

The Court: I have considered the Motion to Dismiss Autrefois Acquit filed yesterday afternoon in this cause on which arguments were heard this morning. I have concluded that said motion must be and is overruled. I have prepared in conjunction with the motion a brief memorandum opinion which outlines my views upon the motion, which I am ordering be filed in this cause and becomes a part of the record in this case.

(Which said Memorandum Opinion is in words and figures as follows, to wit:)

"MEMORANDUM OPINION

Defendant has filed in this case a Motion to Dismiss Autrefois Acquit. The question involved, simply stated, is whether or not this defendant, an alleged participant in a single robbery involving the robbery of several persons, after trial and acquittal of a first degree robbery charge involving the robbery of one victim, may thereafter be tried upon a first degree robbery charge based upon the alleged robbery of another victim. Defendant asserts that such second trial is violative of Article 1, Section 19, Constitution of Missouri, 1945.

The general rule is stated in 22 C.J.S., Section 282,
26 as follows:

> 'Where one act constitutes several crimes there may be a separate prosecution for each crime; but the state can not split up a single crime and prosecute it in parts. A prosecution for any part of a single crime generally bars any further prosecution based on the whole or a part of the same crime, or, as otherwise stated, where a state elects to prosecute an offense in one of its phases or aspects, it can not thereafter prosecute for the same criminal act, or series of acts, under color of another name.'

In the application of the above rule to specific cases where the constitutional prohibition against double jeopardy is involved, a study of the cases reveals that a different rule is applied to different offenses. Generally speaking, a distinction is made between cases involving property rights as distinguished from cases involving offenses against the person. Thus, as is stated in 22 C.J.S., Section 298, "Where accused robbed two persons at the same time a prosecution for one of such robberies does not prevent a subsequent prosecution for the other."

It is stated in 15 Am. Jur., Section 390: "A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had. Consequently, a plea of former
27 jeopardy will not be sustained where it appears that in one transaction two distinct crimes were com-

mitted. * * * where several persons are robbed at the same time, the offender may be indicted and convicted for the robbery of each person as a distinct offense." Cited in support of the latter statement involving robberies are: Re Allison, 13 Colo., 525, 22, P. 820, 10 L.R.A. 790, 16 Am. St. Rep. 224; Johns v. State, 130 Miss., 803, 95 So. 84, citing R.C.L. The rule is also stated in 15 Am. Jur. 384, that one charged with a substantive offense committed in pursuance of a conspiracy can not plead former jeopardy based on a previous conviction or acquittal of another similar, but distinct, offense committed in pursuance of the same conspiracy.

Applying the above general principles to the instant case and looking to the Missouri law, the defendant in support of his motion that trial of the defendant upon the charge of robbing a second victim in the same hold-up as being violative of Article 1, Section 19, Constitution of Missouri, 1945, and Section 556.240, R.S., Mo., 1949, relies upon three Missouri cases: State v. Toombs, 34 S.W. 2d, 61; State vs. Bockman, 124 S.W. 2d, 1205; and State v. Hamlin, 171 S.W. 2d, 714. It will be noted that all three cases relied upon by defendant involve property rights, the Toombs case involving fraudulent issuance of stock certificates, and the other two cases involving the theft of cattle, and in all three cases the appellate courts held that the gravamen of the
28 action was the taking or as in the Toombs case the fraudulent intent to defraud and that there could be but one prosecution, the offense constituting but a single act. The State relies upon two out of state cases, Jones v. State, 95 So., 84, and In Re Allison, 22 Pac., 820, and, as to Missouri law, cites two cases: State v. Williams, 263 S.W., 195, and State v. Varner, 329 S.W., 2d, 623. All of these cases involve offenses committed against the person, as distinguished from offenses involving property.

The instant charge against this defendant, as was the charge in the preceding case upon which he has been tried and acquitted, was that of robbery first degree. In looking at the statute defining said crime, Section 560.120, R.S., Mo., 1949, the statute reads as follows: "Every person who shall be convicted of feloniously taking the property of *another* from *his* person, or in *his* presence, and against *his* will, by violence to *his* person, or by putting *him* in

fear of some immediate injury to *his* person * * * shall be adjudged guilty of robbery in the first degree."

It is apparent to me that the appellate courts of Missouri in construing the law pertaining to double jeopardy have followed what apparently is the majority opinion in the United States, and have made a distinction in cases where the gravamen of the action is an offense against the person, as is a robbery case, from the very wording of the statute making the offense a crime, and as determined
29 in the case of State v. Williams, supra, and as in a murder case, State v. Varner, supra, as distinguished from cases involving property rights where the gravamen of the action is the intent to steal or to defraud as in the cases relied upon and cited by the defendant.

For the reasons stated herein defendant's Motion to Dismiss Autrefois Acquit must be and hereby is overruled."

Mr. Furry: At this time on behalf of the State I am at this time requesting leave of court to file an amended information in the case of State of Missouri vs. Bob Fred Ashe, alias Bobby Fred Ashe in case No. C-29768.

The Court: This is, as I understand it, an amended information alleging the Habitual Criminal Act which supplants one heretofore filed and alleges no new charges, but is being filed solely for the purpose of correcting some typographical errors that existed in the one heretofore filed, is that right?

Mr. Furry: That is correct. The essential elements of the offense have not been changed, with the exception of adding the Habitual Criminal Act to the charges and also correcting this typographical error in the other information.

The Court: Very well.

Now I want to say this for the record. Yesterday afternoon an agreement was effected between the prosecutor and the defense counsel permitting the jury to separate. That agreement was made necessary in order that the jury
30 might be sworn and be released from duty until such time as the Court could hear evidence and pass upon the motion filed in this case. That matter has been determined and the case will proceed to trial. In view of the wide publicity that has attended this case, the fact the co-defendants have been tried, convicted, the double jeopardy matter that is involved here which received a lot of

publicity, and the wide reputation of the defendant, in order that there might be no possible error or any outside influences reach this jury, I on my own motion am going to keep the jury together until completion of this case.

(State's Exhibits 1 and 2 were marked for Identification.)

• • • • • • • • • • •

31 (State's Exhibits 1 and 2 were received in evidence.)

• • • • • • • • • • •

32 (Recess)

(Counsel for the State made his opening statement to the jury.)

Mr. Harrington: If it please the Court, I will reserve my opening statement.

The Court: Very well. Call your first witness.

STATE'S EVIDENCE

Viola Gladson,

called as a witness on behalf of the State, being duly sworn, testified as follows:

33 Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. Mrs. Viola Gladson, 500 Browning, Lee's Summit, Missouri.

Q. Mrs. Gladson, where were you living on January 10 of this year? A. At 307 East Orchard, Lee's Summit, Missouri.

Q. Mrs. Gladson, are you a married woman? A. Yes, sir.

Q. What is the name of your husband? A. John Gladson.

Q. And were you and Mr. Gladson living at that address at that time? A. That is right.

Q. Directing your attention to the early morning of January 10, this year, did anything unusual happen at your home? A. Yes. That evening, on Saturday evening, my husband had some friends in to play cards, and about 11:00 o'clock I took sandwiches and coffee to them and I went to bed.

Q. This address you have given us, will you describe what it is? Describe the residence. A. Well, it is just a one story ranch-type house with attached garage, and basement, stairway going in from the garage, and also the kitchen door goes into the garage.

Q. Now, where were the men playing poker? A. In the basement.

Q. You had gone down, you say, around 11:00 o'clock and took coffee and sandwiches? A. That is right.

Q. After you took the coffee and sandwiches to the men, what did you then do? A. I came back upstairs and went to bed. I had not been feeling very good and I took a sleeping pill and went to bed.

Q. You say you weren't feeling good. Could you tell the Court and jury why that was? A. I had had arthritis pretty bad in my spine, and I had been in bed about six weeks before that, but was able to get up and and about a bit, and I was tired and went to bed early.

Q. After you went to sleep in the bedroom at 11:00 o'clock, there in your own home, tell the Court and jury what happened next? A. Well, the next thing I knew—I was asleep, and I was awakened suddenly. I heard a noise in the basement, and it sounded like someone said, "This is a stick-up, don't make any move," and I thought, "Well, I must be dreaming, or somebody's playing a joke or something," so I didn't raise up or anything, and about the same time my bedroom door opened, and I thought it was my husband come upstairs to go to the bathroom or something, and—

Q. When he opened the door what did you see? A. Well, this man was—he opened the door, and I just saw the shadow of a man standing there, and I thought it was my husband because he had a hat something similar to the one he was wearing and I lay there a minute and he kept standing, didn't move, so I raised up and I said, "Yes," and he told me to turn over on my stomach, don't make any noise, it was a stick-up. So I did. Then he came around to the bed and he pushed my hands behind my back, and put the pillow over my head, so then he went around to the dresser and turned the light on on the dresser, and then he saw the phone on the night stand,

so he jerked the phone loose, and came back around to my side of the bed and tied me up with the phone cord.

Q. Now, at the time he—what did he do with the telephone? Where was it located? A. We found it on the floor later.

Q. Where was it before? A. On the night stand by the side of the bed.

Q. What happened to the telephone? A. Well, it was jerked loose from the wall and he jerked the cord loose and tied me up with the cord.

Q. You were lying in bed at that time? A. Yes.

Q. Just describe to the jury your position at that time. A. Well, on account of my back hurting, I sleep on my stomach, and so I was already on my stomach when he told me to turn over, but he come up and put my hands behind me and I hollered and he told me to shut up.

36 Q. Why did you holler? A. I told him I had arthritis in my back and it hurt.

Q. Did it actually hurt? A. Yes, it did.

Q. What part of your body hurt? A. My whole back.

Q. All right. What was being done to you at the time your back was hurting? A. When he started to tie me up with the phone cord he put my hands behind me and put them in a position flat like this (indicating) in the back and tied them together and pulled my feet up behind me and tied my feet to my hands.

Q. Was that position painful? A. Yes, it was.

Q. All right. Then what happened after that, after you were tied up? A. Course, in the meantime while he was tying me up, he wanted to know where my jewelry was and my money, and I said, "All the jewelry I have is what I have on." So I had a dish on the dresser with my costume jewelry in it, and he went through that.

Q. Mrs. Gladson, we have a lot of competition, you will have to speak louder. I believe you testified that you had been tied up laying on your stomach with your hands behind your back and your legs tied to your hands, is that correct? A. That is right.

Q. From that point on, tell the Court and jury
37 just what happened, what you heard and what you saw. A. Well, then he kept asking where my jewelry was and I said all I had was what I had on. I told him I didn't have any money, all I had was in my purse on the

dining room table. So he looked and he came back and it wasn't there, anyway he couldn't find it, and I said, "If it is not there," I said, "My billfold is in my red coat pocket in the closet. I have been to the grocery store and I don't have any money. I only have a dollar." He was kind of perturbed I only had a dollar, and he came back to the bed and again asked where my jewelry was, and I said, "All I have is what I have on." So then he took my wedding ring.

Q. Where was your wedding ring? A. On my finger, and by my knuckles being swollen from the arthritis he couldn't get it off, and he had to work, and I told him to let me get it, because I could move my hands like this a little, but he didn't, and he finally got it off. Made a blister on my finger.

Q. Did you ever recover that ring? A. No, sir, I haven't.

Q. Mrs. Gladson, do you know about what time it was? A. It was around four o'clock.

Q. How could you tell that? A. Well, because after we were all—you know, after we got untied and everything, we looked at the clock and it was about 4:20, 4:30, some-
38 thing like that.

Q. How long was this man in your room? A. Seemed like quite a while but probably wasn't over 15 minutes, 15 or 20 minutes.

Q. Did he then leave the room? A. Yes, after he got my ring off, he covered me back up with the covers and went out the door and said, "Don't make any noise, because I will be sitting here watching you," and with that he closed the door and went out.

Q. While you were up in your room, did you hear any noises or hear anything else in any other part of the house? A. Yes, I could hear scuffling and talking in the basement.

Q. Was that unusual? A. Yes.

Q. The noise you heard? A. Yes.

Q. Then after the man told you he would be watching you, what was the next thing you heard or did? A. The next thing I was wondering how long I was going to have to lay there, because I was uncomfortable, before anyone found me. I didn't know what was going on in the basement and I didn't know when somebody would get there, so I was worried about that. Then I heard somebody call me. It was Mr. Knight, my husband's guest.

Q. Did you hear anything or any sound prior to that? A. Well, yes, I heard a car drive away. I heard a car start up and pull away, but even at that I was afraid
39 to answer. I felt he could still be there. So I didn't answer Mr. Knight at first, and he called me again.

Q. So the next thing other than this car driving away you heard somebody call up from the basement, is that correct? A. Yes.

Q. Then without going into any conversation at that time, tell us what was done. A. Well, then Mr. Knight and Mr. Roberts came up and the two of them got me untied. Then I got up and I gathered up all the insurance papers out of our metal box which were all over the bedroom floor, and I got in the bedroom closet and got four or five pair of pants and took downstairs for the men.

Q. You told us about the telephone, did you find your telephone? A. The phone in the kitchen had been torn out and was on the front room floor by the television set.

Q. Where was the other phone? A. The bedroom phone which was on the night stand was on the floor in the bedroom.

(State's Exhibits 3 and 4 were marked for identification.)

Q. Mrs. Gladson, I hand you what have been marked State's Exhibits 3 and 4 for identification, and ask you to identify those, please. A. Yes, this black phone was our bedroom phone, and the white one was in the kitchen.
40 Q. Are these two phones and their cords and parts thereto in the same condition they were on the morning of January 10 when you were untied and came out into the room? A. Yes.

Mr. Furry: I offer in evidence State's Exhibits 3 and 4.

Mr. Harrington: No objection.

(State's Exhibits 3 and 4 were received in evidence.)

Q. (By Mr. Furry) That is your telephone number on the front? A. That is our phone number, yes.

Q. Broadway 11554? A. That is right.

Q. And the black phone was the one in your bedroom? A. Yes.

Q. Where was it found? A. On the floor in the bedroom.

Q. And the white one? A. It was in the living room in front of the television set.

Q. Mrs. Gladson, did you later identify the man who was in your room that morning on January 10? A. Yes, I could only tell by his voice because I didn't see him.

Q. Was there anything unusual about his voice? A. Yes, he had a different sounding voice, rather soft spoken, didn't talk too loud, but talked practically all the time he was in the room. And I thought if I ever heard it again I would know it because it was so different.

41 Q. When you saw him as he first came into the room, did you get a look at his size or build? A. Yes.

Q. And did you later identify that man? A. Yes, I did.

Q. And what was his name? A. His name was Johnny Johnson.

Q. I see. When was the next time that you saw him after being in your room? A. It was out at the Lee's Summit Patrol Headquarters.

Q. What day was that, how long after? A. It was on Sunday. It was approximately—this happened around 4:00 o'clock and this was around 10:00 or 10:30.

Mr. Furry: I believe that is all.

Cross Examination

By Mr. Harrington:

Q. Is that the only strange man that you saw in the house that morning? A. Yes, sir, it was.

Mr. Harrington: That is all, Mrs. Gladson. Thank you.

Mr. Furry: That is all.

(Witness excused.)

42 **Donald Knight,**

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, to the jury? A. Donald Knight, 300 East Fifth, Lee's Summit, Missouri.

Q. What is your occupaton, Mr. Knight? A. Druggist.

Q. Are you the owner of the store out there at Lee's Summit? A. Yes, sir.

Q. How long have you had it? A. Twenty-one years in Lee's Summit.

Q. Mr. Knight, were you at the home of John Gladson on January 10 of this year? A. Yes, after ten o'clock at night.

Q. That home is in Jackson County, Missouri, isn't it? A. Yes, sir.

Q. Now, just tell us what time you arrived? A. Oh, 15, 20 minutes past 10:00.

Q. Where had you been just prior to that time? A. Closing up my drugstore.

Q. I see. And when you arrived—what was the the reason for going there and what did you find? A. Playing cards, and I found Gladson, Goodwin, Roberts and Freeman was there.

43 Q. I see. And did anybody else join you later on? A. An hour or so later McClendon came in.

Q. That is Richard McClendon? A. Richard McClendon, yes.

Q. What did you do from that time up until early morning? A. Played cards.

Q. And what game were you playing? A. Poker.

Q. Now, was it a game for money? A. Yes, sir.

Q. Can you tell us about how much cash was on the table during the evening? A. Oh, it couldn't have been more than seven or eight hundred dollars.

Q. Now, directing your attention to approximately four o'clock that morning, did anything unusual happen? A. Yes, I was standing up stretching about four o'clock in the morning, and I heard somebody walking upstairs, and I said to—we were in the barber's house, Gladson's house—and I said, "That don't sound like your wife, John, sounds like a man walking," and he says—Ray Roberts was sitting there—he said, "Ray, go see who that is," and Ray says, "Let Knight go, he is standing up," and I went to the door and opened it and I saw two men, one with a shotgun and one with a pistol, and I slammed the door and put my shoulders against it, and they kicked it open and shoved me back against the wall, and when they came in there

44 was three of them. One with a shotgun, one with a shiny pistol, I thought at first it was a cap pistol, but I found out later it was a nickel plated pistol, and one had a dark looking pistol.

Q. You say you were standing up? A. Yes, sir.

Q. And started to go upstairs? A. Yes, sir.

Q. Where did these stairs lead? A. Up into the garage built to the side of the house, and the door was in the corner of the room, in the southeast corner of the room of the basement.

Q. Then you say as you opened the door, that is when you saw— A. And they yelled, "It is a hold-up," and kicked open the door and pushed me back against the wall.

Q. How was the shotgun held when you saw it? A. Right up in front of him like he was presenting arms.

Q. And that was when you put your shoulder to the door? A. I slammed it back and put my shoulder to the door, and they kicked it open.

Q. When they kicked the door open what happened to your body? A. They slammed me against the wall, because the wall was—the south wall was right next where the door laid back against the south wall of the basement.

Q. What was it they said when they entered at first? A. "It is a hold-up, stick-up."

Q. All right. Just tell us what happened, tell the
45 jury what these men did and what happened to the people there in the basement from that point. A. Well, there was a lot of milling around, confusion. They had us sitting on the floor, first, most of them. They had me against the wall, my face against the south wall most of the time, and then they got me out on the floor and tied a clothesline around us, and had us sitting down, tied up, and—

Q. Now, were all the men in the basement over against the wall? A. Sir? No, there was, I think, most there was of them over there was two, maybe three.

Q. I see. A. So darn much confusion, I can't get it all straight.

Q. But as I understand your testimony, the greater portion of the time there, you were actually facing the wall, is that correct? A. That is right.

Q. All right. Now, was there any conversation there in the basement that you heard? A. Oh, yes, there was conversation. They was pushing these fellows around, told them to take their pants off, I had to take mine off, and all except one man, that is Gladson, they didn't make him take his pants off, and they didn't tie him up.

Q. But the other men did have their trousers removed? A. That is right.

46 Q. Did these men say anything directly to these men that were playing poker there, your friends? A. What was that?

Q. Did these men who had the weapons, these three men you described, did they say anything to you men who were there playing poker? A. Yes, they said—first thing they did was grab the money up off the table, and one of them said, "Four thousand bucks," or something like that, I don't know what he meant by it—there was a lot of things said, "Get over in the corner," or "Get there in line," pushing around, things like that. One of them done a lot of talking, about nothing.

Q. Now, how were these men dressed? A. Well, they had—what I noticed more than anything was a red bandana across their face, two of them, and one of them had a white deal on.

Q. Which one had a white deal on? A. It seems to me it was the man with the shotgun.

Q. Did you ever see his face or any of the faces of the three men during the evening? A. No, I didn't.

Q. By the way, going back a minute, while I am thinking of it, how long had you been playing poker with some of the men in this particular game that evening? A. Since '46, since we organized the V.F.W. Post.

47 Q. Where is that V.F.W. Post? A. In Lee's Summit across from the City Hall.

Q. And John Gladson had a physical condition, did he not, ailment? A. He has had a heart ailment, yes, sir.

Q. All right. Now, did you notice anything unusual about any of the three men—I am referring to the two with pistols? A. One of them talked like he had mush in his mouth, thick-tongued.

Q. Do you know which one of the three men that was? A. I am not certain, no, sir.

Q. As I understand, you did not get a good look at any one of the three men? A. No. That is right.

Q. Do you know whether or not the man who had the thick voice, which you described as a thick voice, do you know which weapon he was carrying? A. I couldn't positively say. It seems it was the black pistol or black stick of iron is what it looked like to me.

Q. What kind of shotgun did the man have? A. Single barrel. It looked to me like it was either a .16 or .12 gauge.

Q. Did you get a look at the color of the stock of it? A. Yes, it was walnut. That is the piece under the barrel, that is all I could see.

48 (State's Exhibits 5, 6 and 7 were marked for Identification.)

Q. First of all, Mr. Knight, I will hand you what has been marked State's Exhibit 5 for identification and ask you to take a look at that, if you will, sir, and identify it, if you can? A. Well, it is just black and that is all. It was a dark gun—I never did get a good look at the gun—whoever had this gun—but I did see the one that was standing on the steps with this shotgun and the guy behind him had this—

* * * * * * * * * * *

A. The only good look I got at the guns is when they were standing on the steps and the man on the first—in front on the first step had the shotgun.

Q. You didn't get a good look at the revolvers? A. Just a glance.

Q. But there was one gun that was dark? A. Yes.

Q. Describe what you saw. A. A dark gun.

Q. What part of it did you see? A. Just the barrel part.

Q. All right. I will hand you State's Exhibit No. 6.

A. And the man on the second step behind the man
49 with the shotgun had that.

Q. Is that the gun, State's Exhibit 6, you saw? A. Looks mighty like it. Shiny nickel-plated gun.

Q. All right, sir, I hand you State's Exhibit No. 7. Take a look at that. A. That looks an awful lot like the shotgun the man was holding on the steps.

Q. It was a single barrel? A. Yes.

Q. Same type of stock? A. I got a good look at the barrel because he used the barrel to pry the door open.

Q. You would say this gun is similar, is it, to the one you saw? A. Yes, sir.

Q. All right. Mr. Knight, did you have some property taken from you out there that morning? A. Well, some money, and some checks, and a billfold, and a wrist watch.

(State's Exhibits 8, 9 and 10 were marked for identification.)

Q. Mr. Knight, I hand you what has been marked State's Exhibit 8 for identification and ask you to take a look at that? A. It is my billfold.

Q. Was that the billfold you had that morning? A. Yes, sir.

Q. And the one taken from you, is that correct? A. Yes, sir.

50 Mr. Furry: I offer into evidence State's Exhibit No. 8.

Mr. Harrington: I presume these cards are yours?

The Witness: Yes, sir.

Mr. Harrington: No objection.

(State's Exhibit No. 8 was received in evidence.)

Q. (By Mr. Furry) Mr. Knight, was the billfold ever returned to you? A. It was returned to my store by a Lee's Summit policeman.

Q. About how long after the occurrence was that? A. About three weeks. It laid out through two or three rains and snows, and it was sop and wet when I got it.

Q. All right. Now, sir, I hand you what have been marked State's Exhibits—first of all let's take 9, and can you identify that? A. Well, that is a torn up dollar bill, looks like one that was in the pots a lot because it had a lot of cellophane tape on it. I am not positive it is the one, but it is mighty similar to the one that was in the game a lot.

Q. Now State's Exhibit No. 10. I will ask you to take a look at that and see if you can identify that. A. Well, I am nearly positive that was the dollar bill I kept on the bottom of my stack, and I called it my lucky dollar, and one of the men in the game offered me two dollars for it, and I wouldn't take it, and whenever I throwed that

51 in the pot I won the pot.

Q. Was there some conversation there about that dollar bill that evening? A. Yes, before the robbery Ray Roberts tried to buy it from me. And I know it by that tear in it, and it was dirty and wrinkled up.

Q. When is the next time you saw this dollar bill? A. In the Sheriff's office in Independence.

Mr. Harrington: Where?

The Witness: Sheriff's office. I guess it is their office in the basement of the county courthouse at Independence.

Q. (By Mr. Furry) I see the initials "D.K." there. A. That is my initials.

Q. Those were placed there by you? A. By me, then.

Q. When you were at Independence? A. Yes.

Mr. Furry: I offer in evidence State's Exhibits 9 and 10.

Mr. Harrington: No objection.

(State's Exhibits 9 and 10 were received in evidence.)

Q. (By Mr. Furry) Mr. Knight, did you go out to Troop A the morning following this occurrence? A. Go where?

52 Q. Out to Troop A at Lee's Summit? A. No—you mean highway patrol station? No, sir, I didn't.

Q. You didn't go out there that morning? A. No, I didn't.

Mr. Furry: I believe that is all.

Cross Examination

By Mr. Harrington:

Q. Did you ever later after this alleged robbery see any of the participants who were charged with this robbery? Did you ever see them later at the police station in Independence? Sheriff's patrol? A. No, sir.

Q. Never did see them? A. Only in the courtroom.

Q. Did you ever identify any of them in the courtroom? A. No, sir.

Q. You never got a good look at the black gun, but the first man on the step had the shotgun? A. That is right.

Q. Did you ever describe him to the highway patrol or any of the police officers? A. Only about having a mask on his face and a dark hat.

Q. That was the man with the white mask? A. I think so, yes.

Q. You are not positive. The other two men, I believe you said, had bandanas on their faces? A. That is right. Red bandanas.

Q. Were the men lined up on the steps, one on one
53 step and the next man behind him and a man behind the second one? A. When I first got a look at them, I thought there was two, and when they came in the room there was three. I could see one on the first step and one on the second step.

Q. You never saw the third man at that time? A. No, sir.

Q. Now, the man that you stated had an odd voice, talked like he had mush in his mouth, what type of gun did he have? A. I don't know. I never got a good look at him.

Q. Was he the third man or second man or first man, if you can recall? A. I can't.

Q. Now, you previously stated the first man on the steps had a shotgun? A. That is right.

Q. Can you describe the gun the man on the second step had? A. Nickel-plated gun, shiny. When I first glanced at it I thought it was a cap pistol.

Q. Did either one of the men, either the man that had the shotgun or the man that had the nickel-plated gun, talk like he had mush in his mouth? A. I had my face to the wall and I couldn't tell who was doing the funny talking.

Q. How many men did you ever actually see? A. Three.

Q. That is all you ever saw? A. When they filed in the room, yes.

54 Q. Did they ever leave and come back? A. Yes, there was two of them come back and they had keys they shook out of our pants, and they were shaking them in our face and wanted to know whose car they belonged to.

Q. The same two men that came back with the keys, were they in the original three men that were in the room? A. I am not certain.

Q. Did they have the same kind of masks on? A. I don't remember.

Q. You said there was one man with a white mask and two with bandanas, is that correct? A. That is right.

Q. All right. Now— A. And I got the first good square look at them as they filed in the room.

Q. When you say they left and two came back with the keys, did they all leave? A. There might have been three, because I was in the back of the group they had tied up with my face to the west wall.

Q. What I am asking you, sir, when the two left supposedly to get some keys you are talking about, did they leave one man there? Did one man stay in the basement? A. It seems to me they all went out.

Q. All three of them? A. I am not positive, because my back was to the door when they went out.

55 Q. But you know two did come back? A. Two or three.

Q. Two or three? A. Yes.

Q. But you never saw over three men? A. That is right.

Q. Now, the three men that came back in the place, or the two that came back in the basement, were they the same build, same voices of the original three that came in on the poker game? The original men you saw on the steps and came in and started this caper? A. When I was looking the most things I could see was the guns and red bandanas. I didn't pay much attention to what they looked like.

Q. Didn't take a look for size? A. The one that had the shotgun looked mighty big to me.

Q. You mean the shotgun looked big? A. That is right.

Q. You can't say positively then that the three men that came back or the two men were not the original three men that were in the room? A. Well, I am under the impression they were, but I am not positive.

Q. You think they were the original three men that came down the steps? A. Yes.

Mr. Harrington: Thank you. That is all.

56 Redirect Examination

By Mr. Furry:

Q. You are not absolutely sure of that because you were facing the wall? A. That is right.

* * * * * * * * * * *

(Witness excused.)

John Gladson.

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. John Gladson, Lee's Summit, Missouri. Browning Street.

Q. What is your occupation, Mr. Gladson? A. Barber.

Q. How long have you been in that business? A. Pretty near 34 years.

Q. And do you work for somebody else or have
57 your own shop? A. I have my own shop.

Q. Where is that shop located? A. 12 East Third, Lee's Summit, Missouri.

Q. Now, have you been recently actively managing and working in the barber shop? A. No. It will be two years the first of August since I have been able to work.

Q. I see. And what is the reason you have been unable to work? A. I have had a heart attack.

Q. Mr. Gladson, directing your attention to the 10th day of January, this year, on the evening of the 9th, let's put it that way, did you have some people over to your house? A. I did.

Q. What were their names and what was their purpose for being there? A. Well, it was Richard McClendon, Don Knight, Jerry Freeman, Orville Goodwin, myself and—I missed one, there was six.

Q. Mr. Roberts? A. Yes, Ray Roberts.

Q. All right. What time did you start playing cards that evening? A. Oh, I would say around—it could have been 9:30, 10:00 o'clock. Really I don't know exactly what time, I mean for sure.

Q. Did you see your wife after you started playing cards that evening? A. I did. About, I would say, it was 11:30 or 12:00 o'clock she came down stairs and brought some sandwiches and some coffee.

58 Q. After she brought that down, what did she do then? A. She didn't feel good, so she said she was going upstairs and go to bed.

Q. What did the rest of you continue to do or do? A. We were playing cards.

Q. Did anything unusual happen that morning of January 10? A. Well, in the beginning our kitchen is right up over the basement where we were down in the basement, and I heard footsteps up there, so I told—I said, "One of you boys go up and see who is up there," I said, "I know it is not my wife, because it is too heavy, somebody is walking on the floor," and so Don Knight started to go upstairs to see who it was. I didn't want to climb the steps any more than I had to on account of my heart condition, and he started upstairs, and that is when they kicked the door in.

Q. You say that is when they kicked the door in. What did you see at that time? A. Well, there was three of them came in. They said, "This is a stick-up."

Q. Describe the three men that came into your basement. A. Describe them?

Q. The best you can, what you saw. A. You mean physical build?

Q. Physical build, anything unusual about them. A. Well, one of them was quite a bit bigger than the other two.

59 Q. About how big was he? A. Well, about 190 pounds.

Mr. Harrington: How much?

The Witness: I would say 190.

Q. (By Mr. Furry) And how was he dressed? A. He had on just ordinary working clothes, I would say.

Q. Did you get a look at his face? A. I did.

Q. You did? A. Yes.

Q. At the time you could see his face was there anything over it? A. Well, when he first came in he had a deal over his face, but it dropped down and he didn't put anything back over it, just left it down.

Q. You observed the facial features of the heavy set man? A. That is right.

Q. Was this heavy set man armed? A. He had the shotgun.

Q. All right. And what about the other two men? A. Well, they were more slender type. One of them had a nickel plated pistol and the other a dark pistol.

Q. And did you get a look at their faces? A. No, not good, only just maybe their hair, and size and height.

Q. You say you got a look at their hair? A. I mean one was dark headed, and the other was lighter haired.

Q. I suppose being a barber you look at a man's
60 hair, don't you? A. Well, that is kind of natural, I guess, I don't know.

Q. And you say one of the men was dark headed? A. That is right.

Q. Did you hear him speak? A. I did.

Q. Was there anything unusual about his voice? A. Not—nothing to speak of, no.

Q. Was that man armed?

Mr. Harrington: The dark haired man?

A. He had the nickel plated pistol.

Q. (By Mr. Furry) The light colored pistol you described, is that right? A. Yes.

Q. All right. Now, the other man, the blond—

Mr. Harrington: Wait a minute. Did you say he was blond?

The Witness: I said he was light headed.

Mr. Harrington: That is what I thought you said.

Q. (By Mr. Furry) Light headed. Pardon me. Was he armed? A. Yes, he was the one that had the dark pistol.

Q. Did you hear that man speak? A. Yes, sir.

Q. Can you describe his voice to the jury? A. Well, it sounded, oh, kind of mushy, or different than any of the rest of the boys.

Q. When you say "mushy," can you be a little more specific on that? A. Well, I mean he couldn't talk too plain, I mean it just wasn't distinct like the others.

61 Q. I see. All right. Now, these three men, when they came in there—I show you State's Exhibit No. 7 and ask you to take a look at that, if you will, please, sir. A. Well, I couldn't tell you what kind it was, only it was a single barrel shotgun. I do remember that distinctly.

Q. Was it similar to the gun you see in front of you? A. Yes.

Q. Of course, I know you didn't stop and take the serial numbers down or anything like that. A. No.

Q. I hand you State's Exhibit 5, first of all, and ask you to take a look at that and identify it if you can.

Q. This one the light-headed man had, I know that, because—well, of course, there is a difference in size, this gun I remember had a longer barrel than the nickel plated revolver. Other than that I couldn't describe what kind it was or anything.

Q. You mean as to the make? A. As to the make or—I knew it had a longer barrel, I remember that very distinctly.

Q. I hand you State's Exhibit No. 6, and ask you to identify that, if you can. A. This looks exactly like it.

Q. You say that looks like the silver colored or chrome plated pistol you saw? A. Yes.

62 Q. Which man had the chrome plated pistol? A. The dark headed man.

Q. Now, when these men came in the room, sir, will you tell us what happened when they walked in or come through or first looked through the door? A. Well, the door was not locked in the beginning. They just kicked it in and said, "This is a stick-up," and started—we had money on the table and they started grabbing money, and they finally—I told them I had a heart condition, and they said they knew it, and so then they rounded everybody over to the other side of the basement.

Q. Did they take you over there? A. No, sir, not then they didn't.

Q. Where were you at that time ? A. Well, I was just kind of in between. In fact, I was right in the middle.

Q. In the middle of the basement? A. So when they got them rounded up over there, taken their rings and what-not off of them, I went over and sat down in a lawn chair on the other side of the basement.

Q. Did you stay in the lawn chair? A. No, finally at the last they made me get up and get in the ring where they had the rest of them tied up, and they tied me up and made everybody sit down.

63 Q. What did they tie them up with? A. Kind of a clothesline, ordinary rope that is used for clothesline.

Q. Where did that come from? A. It was in the basement.

Q. About how long were these men in the basement? A. It is hard to say. I would say 20 or 25 minutes.

Q. Now, did these men who were in the basement, did the same three men stay in the basement during that entire time? A. They did up until right up to the last.

Q. Just tell us what happened up to the last. A. I mean I was the last one they made get into the ring. I told them not to tie me tight because I couldn't stand it, and they didn't tie me tight, and then the rest of them kind of left and one came down with some keys to a car.

Mr. Harrington: Give me that again.

A. I say some of them left and came back with the keys to a car and wanted to know whose car they belonged to and nobody knew.

Q. (By Mr. Furry) Do you know how many men left there? A. Well, I think there was three left and one came back down.

Q. Then did any other men besides the one who was down there, did any of the other men come back down in the basement? A. I wasn't in a position to see, only I could hear the one man talking about the keys.

Q. Which man? A. I say I couldn't see him.

64 Q. I see. All right. A. Because I was down on this side, and he came—the door was there (indicating), and I am clear back on this side with all of these other boys in front of me. But he wanted to know who the keys belonged to, and they said, "Well, we ought to blast into them, we could find out then."

Q. Who said, "We ought to blast into them." A. Well, you want me to give his name?

Q. Which one of the three men? A. Well, that was Brown who had the shotgun that said that.

Q. That is the one that had the shotgun and was described as the heavy man, is that right? A. Yes.

Q. All right. Mr. Gladson, did you have any property that was taken from you there that evening? A. I had a diamond ring and my pocketbook and $10.00 in cash.

(State's Exhibits 11, 12 and 13 were marked for identification.)

Q. Mr. Gladson, I hand you what has been marked State's Exhibit No. 11 for identification and ask you to take a look at it. Identify it, if you can, please. A. That is my property.

Mr. Harrington: That is what?

The Witness: My pocketbook.

Q. (By Mr. Furry) When you say your pocketbook— A. This is my own handwriting. The "s-o-n" is broken off.

Q. When was the last time you had it in your pos-

65 session, actually keeping it? A. What do you mean keeping it?

Q. Was that the billfold you had that night? A. That is right.

Q. Or that morning? A. Yes.

Q. This writing that is on the front of it, that was in your signature? A. That is my signature, yes.

Q. I notice it has— A. The "s-o-n" is broken off and had been broken off for some time.

Q. It was broken off prior to this occurrence, is that right? A. Yes.

Mr. Furry: I offer in evidence State's Exhibit No. 11.

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(State's Exhibit No. 11 was received in evidence.)

Q. (By Mr. Furry) Is there any question about the
66 fact that is the billfold you had that morning? A. That is the one.

Q. And that is the one that was taken? A. That is right.

Q. I hand you what has been marked State's Exhibit 12, which is a ring, and also State's Exhibit 13, a pair of gloves, and ask you to look at those, if you will, please? A. That is my ring, but it is not my gloves.

Q. This ring that is State's Exhibit No. 12, did you have it with you that morning at your home when this occurrence happened? A. I had it on my finger.

Q. Which finger was that? A. This one (indicating).

Q. Which one of the men took the ring? A. The dark headed man took it.

Q. He is the one with the light colored pistol? A. That is right.

Q. Was this ring that was taken from you that morning? A. That is right.

Q. Now, State's Exhibit No. 13, which are the gloves, you say you have never seen those before? A. They are not my gloves, no.

Q. Had you seen these gloves at any time prior to the night you were robbed? A. No, sir.

Mr. Furry: I offer into evidence State's Exhibit
67 12 only, at this time.

Mr. Harrington: I have no objection.

(State's Exhibit No. 12 was received in evidence.)

Q. (By Mr. Furry) Mr. Gladson, let me show you State's Exhibits No. 9 and 10, two one-dollar bills, and ask you—let's take a look at 9 first. Can you identify that? A. Well, there was one in the game that had this plastic, whatever you call it, to stick it together, it had that on it.

Q. Is that one of the bills that was in the game that morning—evening and morning? A. It looks just like one of them.

Q. Are your initials on that bill any place, do you know? A. I have my initials on one. I don't think I have mine on this one.

Q. Let me show you State's Exhibit 10. A. My initials are on this one.

Q. Can you identify State's Exhibit No. 10? A. Here are my initials there (indicating).

When did you put your initials on the bill? A. It was on Sunday. I guess it would be the 10th.

Q. The same day this robbery took place? A. Right.

Q. And this is one of the bills that was in the game, was it? A. That is one just like it. Everybody had a lot of fun with it, because it was an old beat-up, ragged dollar
68 —I mean there was quite a bit of comment about it, kidding back and forth about it.

Q. Do you know how these men left, or when did they leave? Tell us what happened after they left the basement there? A. Well, finally we heard a car honk its horn, and then that is when they all left.

Q. You heard the honk of a horn? A. Yes.

Q. And when you heard this honk, how many men were in the basement at that time? A. I think there was just maybe one left at that time. Like I say, I couldn't be definite on it, because I was back on this side of the bunch. There were six of us, and I am on this side.

Q. All right. What happened after the men left and you heard a car drive off? A. Well, first thing we done was got upstairs and seen about my wife, see what happened to her, and—

Q. What was her condition when you saw her? A. Well, I didn't hurry right up, because I didn't feel too good myself, so Don Knight went up and Ray Roberts, I think, is the one that untied here.

Q. In other words, the next time you saw her she was already untied? A. That is right.

Q. Describe her appearance, physical condition,
69 when you saw her? A. Well, of course, she was all upset, naturally, and nervous. She had this rheumatic condition anyway, which is bad, I mean she couldn't hardly stand to be touched, let alone being tied up like that.

Q. What kind of condition does she have? A. Rheumatism, some kind of arthritis condition in her back.

Q. Now, did you at any time after that or did you later that day see any of the men who were there in the base-

ment with the guns and weapons you have described? A. Well, I saw four that I thought to be the same ones.

Q. Where did you see these men? A. Out at the highway patrol.

Q. That is Troop A, Lee's Summit? A. Right.

Q. About what time was it you were out there? A. Oh, I would say around 10:00 o'clock, I don't know exactly.

Q. That was the same morning? A. Right.

Q. All right. Now, were you able to identify the men that were in the basement? A. You mean—I positively identified one, and the others as being the same size. Of course, I only saw three. I never saw one at all. I mean to my knowledge.

Q. Which is the man that you identified by seeing his face? A. That was Brown.

Q. He was the man with the shotgun and his mask fell down, is that correct? A. That is right.

70 Q. All right. Did you identify the other two men that were down in the basement with the pistols? A. One had dark hair and the other had light hair, I know that.

Q. Now, the man with the dark hair, did you see him that morning? A. Yes, sir.

Q. What was his name? A. Larson.

Q. And did you see the other man, the one who had the dark pistol? A. Yes, I saw Ashe.

Q. Do you see him here in the courtroom? A. I do.

Q. Where is he? A. Over there.

Q. The man sitting behind his attorney? A. That is right.

Q. And how was it that you were able to identify this defendant as being in your basement? What was it about him? A. Oh, I mean outside of size—I mean color of his hair and speech would be the three things I could.

Q. Was he the man as far as size and build and weight, did he correspond to this defendant? A. He did.

Q. And did you hear this defendant speak out at Troop A? A. I did.

Q. Describe to the jury his voice when you heard him speak at Troop A. A. Well, he couldn't talk real

71 plain on account of his—he had something wrong with his tongue, so his speech was not plain like the rest of them.

Q. Do you know what was wrong with his tongue? A. Well, he kept sticking it out, I don't know. I know it was all dark back here in the middle. They said he had had it sewed up. I don't know.

Q. You don't know exactly? A. I am not a doctor. I didn't sew it up.

Q. How did that voice compare with the voice of the man in the basement who held the black pistol? A. I would say very much alike.

Mr. Furry: I believe that is all.

Cross Examination

By Mr. Harrington:

Q. Mr. Gladson, did you see these people that entered?

The Court: Mr. Harrington, would you please talk louder, I am having difficulty hearing you.

Q. (By Mr. Harrington) When the door was first kicked in, did you see these men come in? A. Yes, sir.

Q. Did they have masks on? A. They did.

Q. The first man, what kind of a weapon did he have? A. I don't know about the first man. They all came in at once. Kicked the door down—not down, but open.

Q. What kind of masks did they have on their faces? A. Two of them had red bandanas, and the other had a white scarf.

72 Q. Who had the white scarf? A. Brown.

Q. That is the man whose mask fell down? A. That is right.

Q. You later identified Brown in another trial? A. That is right.

Q. That is the man with the shotgun? A. That is right.

Q. What kind of clothes did Brown have on? A. Brown, he had on, I would say, work clothes, not overalls, but just working clothes.

Q. Did he have a jacket of some type on? A. I couldn't say for sure whether he had a jacket on or not, he had on a shirt and trousers.

Q. Did he have a hat on? A. Yes, sir.

Q. Now, the dark man, the dark man had the light colored pistol?

Mr. Furry: You mean the dark haired man?

Q. (By Mr. Harrington) The dark haired man had the light colored pistol? A. That is right.

Q. What kind of clothes did he have on? A. Well, he was dressed—he had on a white shirt and trousers, I don't know what color, of course.

Q. Did he have a jacket on? A. I think he did at the time.

Q. Did he have a hat on? A. He had a cap on.

Q. And he had a bandana? A. That is right.

73 Q. How far up did the bandana go around his eyes, the ridge of his nose? A. I would say somewhere around there. Where I could see him was back in here (indicating). I was like this (indicating). I mean he reached right over and jerked all our pockets loose.

Q. Show me again where the bandana went around his head. A. Well, it went to about right there (indicating). I could see this part of his neck right here (indicating).

Q. Did it cover up part of his ears or was it lower than his ears? Could you see his ears? A. Well, I don't remember about his ears, particularly. You could see the bottom of his ears, I would say.

Q. How much hair could you see, if he had a cap on and this bandana around his head? A. You could see quite a bunch right along in here.

Q. Now, the other man, did he have a bandana around his face? A. He did.

Q. What kind of clothes did he have on? We are talking about the light haired man. A. Just about the same way, white shirt.

Q. Slacks? Work trousers? A. Dark trousers of some kind.

Q. Did he have anything on his head? A. He had a hat on.

Q. Was the bandana around the bridge of his nose? A. He had a bandana on, I didn't—

74 Q. Well, his face was covered, wasn't it? A. Part of it, yes.

Q. Could you see his eyes? A. Sure, you could see his eyes.

Q. Could you see his forehead? A. Well, not necessarily, no.

Q. The hat was pulled down? A. Well, it was not down too far, no, sir.

Q. But you could distinctly see his hair? A. See the back of his neck. I mean I was just like this, nothing to keep me from seeing his hair.

Q. You got the impression he was a light haired man. A. Well, I would say he was a light headed man.

Q. All right. Now, there were three men that came in? A. That is right.

Q. When you went out to Troop A at Lee's Summit you saw more than four men there, didn't you? A. I believe seven. I think seven or eight, I don't know.

Q. Did you ever see a man known to you as Johnson? A. What?

Q. Johnson. Did you ever see a man known to you as Johnson? A. No.

Q. You never saw him at Troop A? A. Oh, Johnson?

Q. Yes. A. Oh, yes, sir.

Q. You saw him at Troop A? A. Yes, sir.

75 Q. He wasn't one of the men that was in the basement? A. Well, I say I didn't see him.

Q. Now, you saw three men in the basement, and the only one that you could positively identify is Brown, is that correct? A. Other than size and speech and what-not. Q. That was because Brown's mask fell down and he never replaced it? A. That is right.

Q. And the men were dressed similarly. Let's take the dark haired man, was he different in build? A. Yes, sir.

Q. What was the difference in his build? A. He was a stocky built man.

Q. Brown was a stocky built man. A. That is who I am talking about. I would say he weighs 190 pounds, maybe 200.

Q. I think we have dispensed with Brown, because Brown's mask slipped and you have identified him, is that correct? A. Yes.

Q. I am talking about the other two men, the dark haired man, what was his general build? A. Oh, I would say about normal, about 5-10.

Q. My height? A. The dark headed man now?

Q. Yes. A. I would say 5-10, 160 pounds.

76 Q. 160 pounds. Slender? A. I would say fairly slender. He wasn't skinny, but he was slender.

Q. The man you talk about as the light haired man, about how tall is he? A. I would say six foot.

Q. And how much would you say he would weigh? A. I would say around 170 pounds.

Q. 170 pounds. All right. Now, when these men left and came back with the keys, how many men left before they came back with these automobile keys? A. That is like I say, I can't give you anything definite on that, because I was on the back side.

Q. In other words, your back was to the door? A. No, I was facing the door, but these other five men were in front of me.

Q. I see. A. I was sitting back in here (indicating).

Mr. Harrington: All right. That is all.

Mr. Furry: That is all.

The Court: Let's have a short recess.

(Witness excused.)

(Recess)

Donald Knight,

recalled as a witness on behalf of the State, being previously duly sworn, testified as follows:

77 Redirect Examination

By Mr. Furry:

Q. Mr. Knight, you have already been sworn. Sit down, if you will. Mr. Knight, I didn't ask you when you were on the stand before about after the car drove away. What did you do then? A. I went upstairs and yelled for Mrs. Gladson. We called her Vi, her name is Viola. I said, "Vi," and she didn't answer, and I called louder and I got a muffled response from in the bedroom. She was lying on her stomach with her hands tied and her feet pulled up and tied to her hands.

Q. What was she tied with? A. The cords from the telephones, extension phone and the regular phone.

Q. Describe to the jury the position of her hands and feet. A. They were pulled up together, tied together, her hands tied together first and her feet tied to her hands.

Q. Was anybody with you? A. No, I was by myself. I told Vi, I said, "I haven't got any pants on." She said, "Get me undone."

Q. Did you then get some pants? A. Yes, I asked her if there was any pants up there and she said there was some at the foot of the bed in a cabinet, and I grabbed an arm load of them, they were sports and work pants of John's. I picked out the biggest pair for myself
78 and throwed the rest downstairs to the boys. Ray Roberts came up about the time I got her nearly undone and we finished it up.

Q. He was there? A. Yes, he come up too, Ray Roberts.

Mr. Furry: All right. I believe that is all.

Recross Examination

By Mr. Harrington:

Q. I am glad the prosecutor forgot to ask you that. I forgot to ask a question, too. How much money did you lose in this game? A. Well, the biggest part of it was checks. I found one of the one hundred dollar checks and twenty dollar check on the floor, and I expect I had around $250.00 in cash in front of me when they came in.

Q. $250 in cash. A. And probably—I don't know what became of the other checks, but I think I had right at $800.00 in front of me, counting the checks.

Q. I am interested in cash. $250.00, you say? A. That is about it.

Mr. Harrington: Thank you, Mr. Knight.

(Witness excused.)

Ray Roberts,

called as a witness on behalf of the State, being duly sworn, testified as follows:

79 Direct Examination

By Mr. Furry:

Q. Would you state your name and address, please, sir? A. Ray Roberts, Lee's Summit, Missouri.

Q. Mr. Roberts, were you at the home of John Gladson on the evening of January 9 and morning of January 10 of this year? A. Yes, sir.

Q. About what time did you arrive at Mr. Gladson's home? A. Oh, approximately around eight o'clock, something like that.

* * * * * * * * * *

Q. What was your purpose of going there? A. We went up there to play cards.

Q. Who all was in the room? A. Well, at that time Mr. Gladson, Mr. Goodwin, Mr. Freeman, I believe, and later Mr. Knight and Mr. McClendon came.

Q. About what time did Mr. Knight come? A. I think approximately ten o'clock.

80 Q. What time did Mr. McClendon get there? A. Sometime after that, between Knight and twelve, I would say. I don't know for sure.

Q. Mr. McClendon has a business there in town, does he not? A. Yes.

Q. What business is that? A. He runs a tavern.

Q. You all played poker there that evening? A. Yes, sir.

Q. Did anything unusual happen that morning? A. Yes, sir.

Q. About what time was it? A. It was approximately around four o'clock.

Q. And what was it unusual that happened? A. Well, first thing, we heard some noises upstairs, somebody walking, and Mr. Gladson he has heart trouble, and he suggested somebody go up and see what it was. Then Mr. Knight he started up, and got to the door and there was somebody there at the door, and he tried to hold the door shut and turned around and hollered, "Boys, it is a hold-up."

Q. Mr. Knight started toward the door and opened the door? A. Yes, sir.

Q. Were you watching at that time? A. Not until he hollered. When he hollered, "It is a hold-up," we all looked, of course.

Q. When you looked over to the door, tell the jury

81 what you saw? A. Well, we saw some men coming in with bandanas over their faces and guns.

Q. All right. And just describe the men that came in the basement there. A. Well, they were dressed in oversized clothes, and each one had a hat on. They had bandanas over their faces.

Q. Were they armed? A. Yes, sir.

Q. How were they armed? A. Well, there was—the way I first described it, until I saw it later, was a sawed-off-4.10. I could just see the barrel. It was a black pistol,

and then the other had a pearl handled pistol, silver plated, and one shotgun.

Q. All right. Just tell the Court and jury what you saw as to their dress. Did you notice the hands of the men that were in the basement? A. Well, there was two different ones had gloves on.

Q. Which two were they? A. I don't know positively which two they were. Two of them had gloves on when they were searching our pockets.

Q. Now, tell the Court and jury what happened when these men rushed into the basement with these weapons. What was said and what was done? A. They immediately ordered us to get away from the table, and after they did that then they ordered us to take our trousers off.

82 Q. Where were you at that time? A. I was just the other side of the table, and I started to reach for my pocketbook, I thought I had a chance to throw it back some place, and one of them said, "Don't reach for your pocket or we will blast you."

Q. Which one was that? A. I couldn't tell you which one it was. There were several different ones talking at the same time, and I immediately taken my trousers off and put them on a chair, and they ordered us over against the south wall, had us put our hands on the wall.

Q. Did you do that? A. Yes, sir.

Q. After you were over against the wall, what happened then? A. Well, they started in—I saw I had a little time, and I had a carat and a half diamond ring on, and I got it off my finger and put it in my mouth, and one of them saw me do that and told me to spit it out or he would blast me. So I spit it out on the floor.

Q. Do you know which one of the men that was? A. I wouldn't say for sure, I don't know.

Q. After you spit out the ring, what happened to the ring? A. They come along and searched our pockets and picked up the ring and taken my watch off then, and the rest of what money I had in my shirt pocket, finished searching us.

Q. Now, this ring that you had in your mouth and
83 they had you spit out, can you describe that ring for the jury? A. Well, it was a carat and a half diamond with a yellow gold mounting, genuine blue cut diamond.

Q. How long had you had the ring? A. Around 15 to 18 years.

Q. What was the value of that ring? A. About $1,500.

Q. All right. And your wrist watch, what kind of wrist watch was that? A. It was a Clinton, self-winding, had a calendar face, with a value of about $85.00. Right new, I had it about a month.

Q. Did you lose a certain amount of cash? A. Yes, sir. Approximately $200.00 in cash, and then about $600.00 worth of checks.

Q. Did you ever recover the diamond ring or the watch? A. No, sir.

Q. After the articles of property were taken from you, tell the Court and jury what happened then? A. Well, they made us all sit down on the floor back to back, and after we had all got down then they had one of us get up, Mr. Goodwin, I believe, and tied him up with his hands behind him, and made each one of us get up, one at a time, and wrapped the rope around and around us, and made us sit back down again, back to back tied up.

Q. Were all the men that were there playing cards
84 that evening tied up? A. Yes, sir.

Q. And had John Gladson been over against the wall with the rest of you? A. No, I don't think they ever did make him go against the wall. He was sitting in the chair, but they did tie him up with the rest of us.

Q. After they tied you up—what did they tie you up with? A. Clothesline. Clothesline rope they pulled down off the ceiling of the basement.

Q. What happened immediately after they tied you up there in that circle? A. Well, they all left but one, and he stayed over by the door and then right away two men come back in there and they had a set of car keys, and they come around the circle and showed them to each one of us trying to make us identify them, and after nobody would identify them, they said, "Blast one of them and they will talk."

Q. Do you know who it was that said, "Blast one of them and that will make them talk"? A. No, sir.

Q. What happened after that, after they showed you the keys? A. After they showed us the keys, then they went on out and we sat there a while. We thought we was possibly in the clear, and we got up then and started untying

one another, and then Mr. Knight he started on upstairs to see about Mrs. Gladson.

85 Q. Before Mr. Knight left the basement, can you tell us about how long the men were in the basement? A. Oh, I would say approximately twenty minutes.

Q. And how many men were in the basement? A. Well, at the time of the hold-up there was three, and later when they come down with the keys a fourth one came down.

Q. Now, were you in a position where you could see the men? A. Yes, sir.

Q. As to size? A. Yes, sir.

Q. And you say that after the two of them left and left one down there— A. Yes, sir.

Q. That is when this fourth man returned? A. Right.

Q. When he returned, how many men were in the basement? A. Just two at that time.

Q. I see. The other two that had been there originally and left did not come back? A. That is right.

Q. All right. Did you later learn whose keys those were they were showing in the group there on the floor? A. Yes, sir. They were my keys.

Q. Why was it that you were unable to identify them at that time? A. Well, it wasn't the regular keys I use. I have two sets and I have one set that I keep with my house keys and so forth, and I had them in a little key set. That is what they had.

86 Q. I see. And where had those keys been kept? A. They were in my pocket in my trousers, and they had my trousers.

Q. All right. Now, you say that after a certain amount of time elapsed—did you hear anything before you untied yourself or left the basement? A. We heard a motor car, a car start outside.

Q. All right. That was when Mr. Knight then went upstairs, correct? A. After we untied ourselves, Mr. Knight went upstairs and I went up with him, and Mrs. Gladson was laying there on the bed tied with her hands behind her and her feet was tied to her hands with an extension cord off the telephone.

Q. All right. And what did you all do then? A. We untied Mrs. Gladson and then we went back downstairs and looked around to see if we could find our trousers and

looked around the garage and couldn't, and Mrs. Gladson then brought us down some trousers, and we put those on and we went outside to look and immediately noticed my car was gone.

Q. You say that is when you noticed your car was gone? A. Yes, sir.

Q. What kind of car were you driving that night? A. '52 Oldsmobile, green, four-door.

Q. Four-door automobile? A. Yes, sir.

87 Q. You say it was gone at that time? A. Yes, sir.

Q. All right, sir. Then what did you do after you discovered your car was missing? A. Mr. McClendon and myself went to the highway patrol station to report what happened.

Q. That is at Lee's Summit, Troop A? A. Yes, sir.

Q. Did you make a report of the occurrences to the State Patrol? A. Yes, sir.

Q. All right. Then after reporting this to the State Patrol, what did you do then? A. We drove back north on 71 by-pass, and drove around on several country roads there thinking we might find my car abandoned, and we didn't find it, and we went back over to Mr. Gladson's, and in the meantime Mr. Gardner, a patrolman of Lee's Summit, had come and he taken a list from each one of us what we lost, and then he left and immediately—wasn't immediately, but in a little bit he come back and said they found the car, found it out by Unity.

Q. Without going into any conversation, after you talked to Officer Gardner, what did you do then? A. After he told us he found the car, me and Mr. Brown got in the car and went out there to see where it was, or see—

Q. Where did you go? A. We went out to Unity. Well, there is a road from the dairy goes down to the

88 rock quarry, and we pulled down in there and we run across Mr. Westerfield.

Q. Who is Mr. Westerfield? A. Night watchman at Unity.

Q. Did you see your car in that area that morning? A. Not right then I didn't. I did—he told us where the car was.

Q. Was he at Unity Farm at that time? A. Was the car there?

Q. Yes. You talked with Westerfield? A. Yes.

Q. Where was it? A. They had already towed it into Burrow Brothers.

Q. All right. Now, about what time was it? A. Oh, I expect by that time it was around 5:00 or 5:30.

Q. All right. And then after talking with Westerfield, what did you do then? A. We drove back over to Lee's Summit Road and around by Little Blue and thought maybe they might go down the railroad track, and when we went by there. There was a highway patrol car there, and we went back to Noland and back over to Knobtown, and by that time it began to get daylight, and we went back up to where the car was.

Q. You went back up to—where, exactly, is that? A. It is about, I would say, two city blocks east of Unity dairy on Colborn Road.

Q. It is a field? A. A wheat field on the north
89 side of Colborn Road.

Q. You went to that wheat field when it started getting daylight? A. Yes, sir.

Q. About what time was that? A. I would say approximately six o'clock.

Q. And what did you do after you got out to the field there? A. We saw the tracks where the car was, and then we thought maybe we might find some tracks where they had left the car, so we walked across there and we did find some tracks, and we followed them down, and after we went clear on down to the multiflora rose fence there on the north side of the wheat field, and they had went back and forth up it, couldn't get through, and we looked back across the field there a ways.

Q. When you say you went to this fultiflora rose fence, where is the fence located? A. Approximately found hundred yards north of where the car was.

Q. That would be the north quarter of this field, is that correct? A. Right.

Q. And you went over to that fence following tracks or prints in the ground? A. Yes, sir.

Q. All right. When you got up to the fence, the multiflora rose fence, you say you saw some tracks, is that right? A. Yes. Tracks that went back and forth, and we looked around and looked back in the field there a ways, and

there was a brown hat, and we went back up there
90 and picked it up, and then we ran across some more tracks, and we followed them on back aways, I would say half way between there and the car, and we found Mr. Gladson's pocketbook, and the ground was kind of tore up where it looked like somebody fell and the pocketbook was about half covered with dirt.

Q. You say that was as you went from the multiflora rose fence? A. Yes, sir.

Q. Back toward where the cars were? A. Yes, sir.

Q. And about half way back is where you found Mr. Gladson's billfold? A. That is right.

Q. All right. Now, what did you do with the billfold? A. Took it up and give it to the highway patrol. They were sitting up there on the highway when we got back.

Q. I hand you State's Exhibit No. 11 and ask you to take a look at that, Mr. Roberts. A. Yes, sir. That is Mr. Gladson's pocketbook, the one we found.

Q. That is the one you found in the field? A. Yes, sir.

Q. All right, sir. After that you went back to the highway patrol? A. On the way back up there we found a .12 gauge shotgun shell there in the field that had not been fired, and we taken that and the hat and pocketbook, all three, and gave to the highway patrol.

Q. Do you know which patrolman that was? A. No, I don't. There was several of them coming and going.

91 Q. There were a number of police officers? A. Yes, sir.

Q. During the time that you first went into that area, until you left, was the area being patroled, to your knowledge? A. Well, there was some police cars around, yes, sir.

Q. All right. I believe you said that the billfold was given back to you? A. Yes, sir.

Q. To return to Mr. Gladson? A. To return.

Q. Did you do that? A. Yes, sir.

Q. Did you find anything else there in the field, sir? A. No, sir.

Q. Now, after you searched the field and turned those objects over to the patrol, what did you do then? A. We went back to Mr. Gladson's house and Mrs. Gladson had breakfast fixed, and we all ate breakfast.

Q. And after that? A. After that we went out by Burrow Brothers to see if we could see my car, and the car was there. We could see it through the window, but it was early and the garage was not open yet.

Q. Was the garage locked at that time? A. Yes, sir.

Q. Where is Burrow Brothers' garage? A. It is about Third Street and 50 Highway, there at Lee's Summit.

Q. Was it inside the garage? A. Yes, sir.

92 (State's Exhibit No. 14 Was Marked For Identification.)

Q. Mr. Roberts, I hand you what has been marked State's Exhibit No. 14 for identification, and ask you to identify that, if you can. A. That is my Oldsmobile car.

Q. Do the physical objects shown in that photograph fairly and accurately portray what is shown in the picture? A. Yes, sir.

Q. Was that the condition of the car when you saw it? A. Not at that time. It was in the garage at that time.

Q. Other than being in the garage? A. Yes. This picture was taken later, after they took it out of the garage. There is another one.

Mr. Furry: I offer into evidence State's Exhibit No. 14.

Mr. Harrington: You could further identify this from the license plate?

The Witness: Yes, sir.

Mr. Harrington: No objection.

(State's Exhibit No. 14 Was Received In Evidence.)

(State's Exhibits 15 Through 17 Were Marked For Identification.)

Q. (By Mr. Furry) Mr. Roberts, did you later go back out that morning to Burrow Brothers? A. Yes, sir.

Q. And when you arrived later that morning was the car in the position as indicated by State's Exhibit
93 No. 14 here? A. No. Not when I went back. It was still in the garage, and they wanted to take fingerprints and so forth. They had not taken it outside the garage yet.

Q. Did they later take it outside the garage? A. Yes, sir.

Mr. Harrington: When you say they wanted to take fingerprints, who are you referring to?

The Witness: The highway patrol. Mr. Place asked me to leave it until later.

Q. (By Mr. Furry) That is Trooper Bob Place? A. Yes, sir.

Q. All right. Were you present when he worked on your car? A. No, sir.

Q. Were you present when he photographed your car? A. No, sir.

Q. Let me ask you this, sir. Let me hand you what has been marked State's Exhibits 15, 16 and 17 and ask you if you can identify those? A. That is the way the car looked when I went to the garage. The clothes and things was there.

Q. You are referring to State's Exhibit 15, is that right? A. Yes, sir. The clothes and stuff were scattered in the car, and this car coat of mine was laying there on the back seat of the car.

Q. Actually this No. 16—you weren't present when
94 this photograph was taken? A. No, sir, not when any of them was taken. No, sir. But I had been there and saw the car.

Q. Did you look inside the car? A. Yes, sir.

Q. Where were you when you saw inside the car? A. In the garage. They asked us not to bother and we just looked in the window.

Q. When you looked in the window, did you see the physical objects that are shown on State's Exhibit No. 15 here? A. Yes, sir.

Q. Which seat is that of the car? A. That is the front seat.

Q. Do the objects that appear in this photograph appear as they did that morning? A. Yes, sir.

Q. All right. And State's Exhibit 17 is a view of which seat of the car? A. That is the rear seat.

Q. Do the physical objects that appear in this photograph correspond with what you saw there that morning? A. Yes, sir.

Mr. Furry: At this time I offer in evidence State's Exhibits 15 and 17.

Mr. Harrington: No objection.

(State's Exhibits 15 and 17 Were Received in Evidence.)

Q. (By Mr. Furry) Now, State's Exhibit No. 15. It has been identified, just tell the jury again exactly
95 what that view is. A. That is the front seat of my car and the clothes that was in it that morning, just like I saw when I went into the garage.

Q. They were stacked up in the front seat? A. Yes, sir.

Q. Were they your clothes? A. I think one coat was. I had a wine colored car coat, jacket.

Q. Were there other articles of clothing in there? A. Yes, sir.

Q. Did they belong to you? A. Well, I had a pair of trousers amongst it, somewhere.

Q. But did all of the objects that appear here belong to you? A. No.

Q. Now, State's Exhibit 17, just tell the jury what that is, sir? A. That is the rear seat of my car and this is my car coat there.

Q. This coat laying on the back seat was yours? A. Yes. That looks like something wrapped up in it, but I don't know what else is in it.

Q. I notice a belt on the floor. A. Yes, sir. That was mine, black belt.

Q. What is this object that appears against the back seat between your car coat? A. Six-pack of beer.

Q. All right. This object that I am pointing to right here on the floor? A. Beer opener.

Q. Now, did you see any parts of your car in the
96 back of this—or had anything been changed? A. Not at that time, I didn't.

Q. Did you later determine— A. Later, yes. My windshield wiper, a little knob there was pulled out and was laying on the floor, and then my cover for the dome light had been pulled off and the bulb taken out.

Q. When you are talking about dome light, so there is no question about it, where was that located? A. Up in the ceiling of the car.

Q. How would that dome light work? A. When you open the door.

Q. When you open the door the light would come on? A. Yes, sir.

Q. You say that light had been removed and the cover? A. Yes, sir.

Q. Were they in and working at the time you drove up to the Gladson home that night? A. Yes, sir.

Q. All right, sir. After you left Burrow's Garage there, did you later go out to Troop A? A. We went on back out to where the car was first, after we left there, was searching for more articles.

Q. That is back out to to field? A. Yes, sir.

Q. Did you find anything at that time? A. No, sir.

Q. Then— A. Then later the highway patrol asked us to go out to the highway patrol station, they had
97 picked up some suspects and wanted us to go out and identify them.

Q. Did you go out to Troop A? A. Yes, sir.

Q. When you arrived at Troop A did you see any of the men you had seen in the basement that morning? A. Later on when they had a line-up. We waited quite a while. They had a line-up for us later on.

Q. Did you identify the men in the basement? A. Yes, sir.

Q. What were their names? A. I didn't know their names. I identified them as numbers. 1, 3, 4 and 7 is the way I identified them. There was eight men in the line-up.

Q. Did you later learn their names? A. Yes, sir.

Q. What were their names? A. Bobby Ashe, Larson, Johnson and Brown.

Q. Did these men at that time speak? A. Yes, sir.

Q. And do you see any of the men that you identified as being in the basement in the courtroom here today? A. Yes, sir.

Q. Will you point him out, please? A. Second one. (Indicating).

Q. At the table? A. Yes.

Q. What is his name? A. Bobby Ashe.

Q. How was it you were able to identify this de-
98 fendant? A. Well, size and actions, and seemed like he had something wrong with his voice, had mush in his mouth or something, talked kind of funny.

Q. Did you hear this man speak in the basement? A. Yes, sir.

Q. All right. Did he speak as Bobby Ashe spoke that morning when you saw him later? A. Yes.

Q. Did you notice anything unusual about his mouth? A. He kept working his tongue, sticking it back and forth and had something black on his tongue. I don't know what it was. Seemed like his tongue was bothering him, or something.

Q. By the way, how much cash money was in that game? A. I don't know.

Q. Do you have any estimate? A. I know approximately how much I lost. I think, roughly, around $800.00 in cash, but I don't know how much in checks and all together.

Q. I am talking about cash. Just your best estimate. A. Well, what they got away with was $800.00, and there was some of it throwed back in the waste basket that they didn't find. So all together there as approximately $1500.

Q. In cash? A. Yes.

Q. What money wasn't taken? A. Well, Mr. McClendon throwed his back over by the trash basket, and then
99 Mr. Gladson throwed his over to one side and got a blanket over it.

Q. But the amount of money in the game that was taken? A. Was approximately around, between seven and eight hundred dollars.

Mr. Furry: All right, fine. I believe that is all.

Cross Examination

By Mr. Harrington:

Q. Mr. Roberts, when this hold-up first occurred, how many men came into the basement? A. Three.

Q. Three men? A. Yes, sir.

Q. They were in the basement before you saw them, you didn't see them on the steps? A. They was coming in.

Q. You say you saw them coming in the door. You didn't see them on the steps? A. Mr. Knight was holding the door, and when they throwed the door open, one was in the door and the other two was on the steps.

Q. The man that came in first, describe him, the man that came in first? A. I couldn't tell you which one came in first.

Q. Can you describe the second man? A. They all came right on in immediately.

Q. All right. Fine. Now, you saw one man with a silver plated pistol, and one with a black pistol, and one
100 with a shotgun? A. Right.

Q. Can you describe the man with the shotgun? A. Well, he was short and stout built.

Q. About how tall was he? A. Around five foot, seven, I presume.

Q. How much would you say he weighed? A. Around 190.

Q. Was he masked? A. When he first came in he had a white muslin over his face, and later it fell down.

Q. And you learned later that was Mr. Brown? A. Right.

Q. Now, describe the second man, the one, let's say, with the silver plated, nickel plated, gun? A. I couldn't tell you which one had which pistol.

Q. All right. Describe the other two men. Let's take one at a time. Were they masked? A. Yes, sir. Red bandanas.

Q. Both had red bandanas? A. Yes, sir.

Q. Was one of them taller than the other one? A. Yes, sir.

Q. They had what kind of clothes on? A. Well, they had some over-sized—one of them had kind of an overcoat, and he had a blue summer hat, straw hat, kind of pulled down.

101 Q. That is the fellow with the overcoat? A. Yes.

Q. How tall was he? A. Oh, I would say about five foot, eight, eight and a half.

Q. About my height? A. Approximately.

Q. And you don't remember what kind of gun he had? A. I couldn't tell you which one had which gun, no, sir.

Q. With the oversized clothes, did you get anything about his weight? A. Yes. You could get a rough idea.

Q. Give me the rough idea. A. I would say around 160.

Q. All right. Now, what about the other fellow? A. The other fellow was about five foot, eleven.

Q. And how much did he weigh? A. Weighed approximately 170.

Q. And how was he dressed? A. Well, he had on a white shirt and a hat pulled down over his face, and, I don't know, some over-sized clothes. I couldn't tell you just what the clothes looked like.

Q. Did he have on a bandana? A. Yes.

Q. Now, when they first come in they ordered you away

from the table over against the south wall? A. No, they ordered us againt the wall, then ordered us to take our trousers off, and later against the wall.

Q. Was that face against the wall? A. Yes, sir, with arms up.

102 Q. Then later they had you sit in a ring on the floor and tied you up? A. Right.

Q. Were they moving about the room in various positions, or did they all stand in the same position? A. They were moving about.

Q. Searching you and searching your pockets and everything? A. Yes.

Q. Could you get any idea of the coloring, not Brown, the other two men? A. Coloring? What do you mean, coloring?

Q. Well, I am gray haired. A. Well, they had hats on.

Q. Couldn't see their hair? A. No.

Q. The bandanas were tied in back? A. Yes.

Q. Could you see their ears? A. Well, I wouldn't say I particularly noticed their ears.

Q. But you couldn't see any hair? A. No.

Q. You could see their eyes? A. Yes.

Q. Could you see their foreheads, or were the hats pulled down too low? A. No, you could see the bandana and hat. Part of the time you could see part of their face, eyes and forehead. As far as any description, I couldn't—

Q. That was the three men. Then when you sat in this circle which way were you facing? A. South.

103 Q. That was against the wall you had been standing? A. Yes, sir.

Q. Do you recall which way Mr. Gladson was facing in the circle? A. I think he was facing towards the east, I am not sure.

Q. Which wall was the door on that they came in? A. On the east.

Q. East door? A. Yes.

Q. Mr. Gladson was facing this way (indicating)? A. I think. I am not positive.

Q. But you were facing this way (indicating)? A. Yes, sir.

Q. From your position could you see the door? A. Yes, sir.

Q. And you could see that at all times during the progress of this thing? A. I wasn't looking at the door all the time, but I could any time I looked over that way.

Q. Was there any covering put over this ring or circle? A. Some of them, yes.

Q. Were you covered? A. No.

Q. They just covered a few of the men? A. Yes, sir.

Q. When these men left the room before this car key situation, how many left? A. Two.

Q. Was it the same two that came back with the car keys? A. No.

104 Q. Was it a different man that came back? A. Yes.

Q. Describe that man. How was he dressed? A. He had on a green pair of unionalls which later I learned was Mr. Johnson.

Q. How big was he? A. Oh, I would say he was around six foot and approximately from 190 to 200 pounds.

Q. Did he have a mask on? A. No.

Q. He wasn't masked? A. No.

Q. Then there was two men that wasn't masked? Brown— A. Not at the time of the hold-up. He came down at the time of the hold-up with the car keys.

Q. He didn't have a mask on when he was asking you to identify the car keys? A. No, sir. But all the time they was doing that they were making us look toward the floor.

Q. But you looked up enough to see them? A. Yes, when he went out the door, yes. When he turned around and went toward the door.

Q. Now, how many men were in this poker game? A. Six.

Q. And you say originally there was about $1500 in cash in the poker game? A. Yes.

Q. But there was only about seven or eight hun-
105 dred taken. It was a poker game, wasn't it? A. Yes.

Q. Now, when you were out to Troop A, when you were out there, did you identify these men by their voices? A. Yes.

Q. And by their actions or mannerisms, as you described it? A. Yes, sir.

Q. Let me ask you this. When these men were at Troop A, when you saw them in this line-up and you picked them out 1, 3, 4 and 7, I believe are the numbers you gave— A. Yes.

Q. Were these men dressed the same—these men in the line-up—as they were at the Gladson's? A. No, sir.

Q. How about the man with the green coveralls? A. He still had his unionalls on. Some of the others had taken their over-sized coats off and their hats off.

Q. Do you remember testifying at the preliminary hearing in Independence on the 28th day of January? A. Yes, sir.

Q. 1960. You were under oath at that time? A. Yes, sir.

Q. In front of Joseph Brady. There were some questions asked you that I want to go into, Mr. Roberts. Tell me if these questions were asked you and if these answers were given.

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106 Q. (By Mr. Harrington) Let me ask you this, first. When you first talked to the highway patrol at these various times, did you ever give them any description of these men? A. Did I?

Q. Yes. A. They never asked me.

Q. I didn't ask you that. Did you volunteer a description of the four men or three men, or whoever the men were that committed this hold-up, when you talked to the trooper? Did you ever describe how the men were dressed and their size and weight? A. I don't think so.

Q. You don't believe you did. First time you ever gave any identification or description was at Troop A when you saw them in the line-up? A. Right. Other than I did say they looked like a bunch of boys that were dressed for a Halloween party, dressed in over-sized clothes and hats pulled down.

Q. Did you ever mention anything about their age? A. I may have.

Q. All right. Now, was this question asked you in
107 this preliminary hearing on January 28 and was this answer given: "Question: You couldn't look at their faces and identify them? Answer: I couldn't identify their face, no, sir." A. That is right.

Q. But here today you say you could identify two of the men? A. Not their face. I didn't tell you—I told you they had bandanas—

Q. Didn't you say you could identify the man in the green unionalls when he was walking out the door? A. Just by his clothes.

Q. Didn't you say you could identify him by his face? A. No.

Q. You didn't say that? A. No.

Q. All right. I believe you stated here a few minutes ago you identified some of these men by their voices, did you not? A. Right.

Q. Let me ask you if these questions were asked you on January 28: "Question: You think Mr. Brown had the shotgun? Answer: Yes, sir. Question: Did anybody talk like they had a mouthful of mush? Answer: They was using loud voices, Mr. Brown used a gruff voice. Question: They had a mask tied around their face? Answer: Yes, it would make their voice sound different. Question: Did they still have those around the mouth when you heard them talk up at patrol headquarters and identified them?
108 Answer: I didn't identify them by voice. Question: How did you identify them? Answer: By size and action. Question: There was no voice identification by you? Answer: I said to start with I had heard some of their voices and their voices would be changed with masks on. Question: You couldn't identify them from their voices? Answer: Not that I couldn't say I had heard them." Were those questions asked you and those answers given? A. Yes, sir.

Q. Did you notice whether all these men had gloves on or not? A. There was two of them as near as I could tell you. The two that frisked our pockets and taken my watch off. I know they had gloves on.

Q. I believe you stated here a minute ago that the man that came down in the basement later you learned was Johnson? A. Yes, sir.

Q. All right. I believe you stated also when Johnson came down in the basement that he didn't have a mask on? A. That is right.

Q. Let me ask you if these questions were asked you on January 28. Speaking of Johnson now. "Question: So

you were not looking at this man in the same manner you looked at him in the basement?" This is during the line-up at Troop A. Answer: You're right. Question: Did he have a mask on? Answer: I couldn't say, my
109 back was to the other boys and he made us keep our heads down. Question: You have three men with a mask and here is a man you don't know whether he had a mask? Answer: Yes, sir. Question: How did you identify him? Answer: By size. Question: So that is all the identification you have of Mr. Johnson? Answer: Yes, sir. Question: Just his size? Answer: Yes. Question: You can not identify his face? Answer: No, sir. Question: You can not identify his voice? Answer: Right. Question: You can not identify his walk? Answer: No." When did you decide Mr. Johnson had on green unionalls? A. When he was going out the door.

Q. When you first saw him at Troop A?

Mr. Furry: I object to that as arguing with the witness.

The Court: Sustained as to the form of the question.

Mr. Furry: Nobody has asked him about the green unionalls yet. That is no sudden decision.

Q. (By Mr. Harrington) A few minutes ago on direct, didn't you identify Mr. Johnson by having green unionalls or coveralls when he went out the door? A. Yes, sir.

Q. At the preliminary hearing in Independence when you were under oath you answered these questions that were propounded to you that I just read? A. I didn't bring that in. I answered the other part. That is right.
110 Mr. Furry: I object. He is again arguing with the witness. Nobody asked him what type of clothes he had on. I don't have a copy of the transcript from which Mr. Harrington read, so I don't know all the questions.

The Court: Overruled.

Q. (By Mr. Harrington) Let me propound this question and answer again. At the preliminary on January 28: "Question: So that is all the identification you have of Mr. Johnson? Answer: Yes, sir." That question was asked you and that answer given? A. Yes, sir.

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Q. (By Mr. Harrington) Let me go a little further. These questions that I am going to read and these answers were propounded to you on January 28 at the preliminary

hearing in Independence. Tell me if these are the questions and answers: "Question: You testified here and identified four men, are you sure there were four men there? Answer: Yes, sir, just like I told you. Question:
111 This man that you say came down there showing the keys around, you don't know whether he had a mask on, you never heard his voice, is it possible that could have been two of the original three that came back? Answer: After they made the circle and going clear around I looked toward the door, I could see both of them going, we sat there two or five minutes, possibly, and I heard the car start. Question: You saw the back of the man going out the door? Answer: As far as standing up, yes. Question: From just seeing him walking out the door and seeing his back, is that how you are identifying him? Answer: For size, yes sir." There was no mention made there of green unionalls? A. No.

Q. "Question: That is the way you are sure there were four men there not two, just seeing the man walk out the door? Answer: Yes, sir." I presume, Mr. Roberts, that you told the whole truth during this preliminary hearing? A. Sir?

Q. You told the whole truth in Judge Brady's court? A. Yes.

Q. You are under oath today? A. Yes.

Q. You are telling the whole truth? A. Yes, sir.

Q. Let me ask you if this question was propounded to you. "Question: You were playing poker that night? Answer: We was in a card game. Question: Were you playing poker? Answer: We were playing pinochle."

That is all, Mr. Roberts.

112 The Court: Let him answer the question.

Redirect Examination

By Mr. Furry:

Q. Did you say you were playing pinochle? A. Yes. That was the highway patrol's idea to start with.

Q. Why was that? A. I don't know.

Mr. Harrington: I didn't get your answer. Who did you say instructed you?

The Witness: That was the highway patrol's idea to

start with. They called it pinochle, and that is what we were calling it.

Mr. Harrington: You mean the highway patrol told you to say you were playing pinochle?

The Witness: No, they didn't say that, they called it that, nobody told us to.

Q. (By Mr. Furry) In other words, nobody told you to say that? A. No.

Q. You were just talking about a pinochle game? A. It was just a joke.

* * * * * * * * * *

113 Q. (By Mr. Furry) I want you to tell this Court and jury about that. Mr. Harrington asked you about it. Why did you call it pinochle? A. Because that is what everybody was calling it. It was a joke around, pinochle. That is what everbody called it, pinochle.

Q. For how long did they call it that? A. Still do, as far as that goes, in a joking manner.

Q. But you were playing poker? A. Right.

Q. There was no question about that? A. Right.

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Q. (By Mr. Furry) This was back on January 28, 1960. A. Right.

114 Q. Out in Judge Brady's court in Independence? A. Right.

Q. You testified out there at that time? A. Right.

Q. I wasn't present at that time? A. Right.

Q. You were asked this question, weren't you, on cross-examination by Mr. Costello, he was one of the defendant's attorneys out there at that time? A. Yes, sir.

Q. Were you asked this question: These bandits you said came in, how many came down together the first time? Answer: Three." A. Right.

Q. "Question: What did they have on their faces? Answer: There were two of them had red bandanas and the other one had a piece of muslin, something white, let's call it that." You were asked that question and gave that answer? A. Yes, sir.

Q. And out at the preliminary hearing you were shown these weapons that have been identified, the pistol, two pistols and a shotgun, were you? A. Yes, sir.

Q. And you identified those weapons, did you not? A. Yes, sir.

Q. And were you asked this question: "Who had the shot gun, which one of the defendants? Answer: I would say Mr. Brown." A. Yes, sir.

Q. And somebody asked you the question: "Did anybody talk like they had a mouth full of mush?" And
115 you said, "They were using loud voices, Mr. Brown used a gruff voice." And you were asked another question right after that, were you? A. Yes, sir.

Q. So you never did actually answer that question, did you? A. No, sir.

Q. Let me ask you here today, sir, did one of the men talk as though he had a mouthful of mush? A. Yes, sir.

Q. Were you ever asked that again at the preliminary hearing? A. No, sir.

Q. All right. In fact, you were asked a large number of questions at that time, weren't you? A. Yes, sir.

Q. You testified for some period of time. Now, were you asked these questions? This is again by Mr. Costello, the defendant's attorney. "Question: They had to have their fingers free? Answer: Not with gloves on." A. That is right.

Q. "Question: What kind of gloves did they have on? Answer: One had a pair of black gloves. Question: What kind of gloves? Answer: Dress gloves, I don't know any specific name for them." Were you asked those questions? A. Yes.

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116 Q. (By Mr. Furry) Now, as I understand it, sir, did they ever ask you what color clothes Johnson had on? A. Not that I remember.

Q. And as I understand your testimony here today—correct me if I am wrong—the first three men that came down, you say they had their masks on? A. Right.

Q. And they were the ones with the weapons? A. Right.

Q. And those were identified as Brown, Larson—

Mr. Harrington: Just a minute.

Mr. Furry: I am trying to clarify it.

Mr. Harrington: Let's not clarify it with you testifying. I object to the prosecutor's leading question because no one has testified as to the names.

The Court: Sustained, as to the form of the question.

Q. (By Mr. Furry) The first three men that came
117 down, one had a shot gun? A. Right.

What color mask did he have on? A. He is the one with the muslin mask.

Q. What was his name? A. Brown.

Q. Then there were two other men that came down originally? A. Yes, sir.

Q. Those two men, were they armed? A. Yes, sir.

Q. With what? A. .38 pistols.

Q. Now, one had a dark colored pistol, you have testified? A. Yes, sir.

Q. Did you identify that man later as being one of the men? A. I identified him later, yes.

Q. What was his name? A. I don't know which one your are talking about. I didn't identify either one that had either pistol.

Q. But you identified the other two men that came in with the pistols? A. Yes.

Q. What were their names? A. Larson and Ashe.

Q. All right. And I believe your testimony was that later after you had been placed in this circle is when you saw this fourth man, is that correct? A. Right.

Q. And you didn't at that time, or did you, testify here today you saw his face? A. I did not.

118 Q. He came down later with the keys, is that right? A. Right.

Q. As I understand your testimony you were looking down at the ground most of the time? A. Yes, sir.

Q. You got a look at him as he walked away? A. Yes, sir.

Q. And you noticed his dress at that time? A. Yes, sir.

Q. How was he dressed? A. He had on a pair of green unionalls.

Q. And when you saw Johnson later on that morning how was he dressed? A. Pair of green unionalls.

Q. Now, as I understand it—what about Johnson and a mask? Tell me about that. Let's clarify that. A. I never did see a mask on him.

Q. That is what your testimony is here today? A. Right.

Mr. Furry: Thank you, sir.

Recross Examination

By Mr. Harrington:

Q. Now, if you didn't see his face how do you know he didn't have a mask on? A. I say I didn't see any mask on him.

Q. If you look up at the height of his face—
119 A. I did not, sir. I looked at him as he was going out the door.

Q. How do you know he didn't have a mask on? A. I said I didn't see a mask. I don't know that he didn't have one.

Q. The questions I propounded to you from this preliminary that you answered on January 28, which is only 18 days after this occurrence—this occurred on the 10th, didn't it? A. Right.

Q. You answered those questions under oath in Judge Brady's court? A. Yes, sir.

Mr. Harrington: That is all.

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120 (Whereupon, the trial of this cause was adjourned until Wednesday, June 22, 1960.)

JUNE 22, 1960

(Pursuant to adjournment of this cause on June 21, 1960, at 9:30 a.m. on June 22, 1960, the following further proceedings were had and entered of record.)

Charles Westerfield,

called as a witness on behalf of the State, being first duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. Charles Westerfield, Lee's Summit, Missouri.

Q. What is your occupation, Mr. Westerfield? A. I am on night patrol for Unity Farm.

Q. Are you employed there now? A. Yes.

Q. How long have you been with the Unity Farm? A. Over a year.

121 Q. Will you tell the Court and jury briefly what your duties are as night watchman? A. To patrol the grounds on Unity Farm.

Q. And they have buildings out there, do they not? A. They do.

Q. How big is Unity Farm? A. It is about 1400 acres.

Q. And the area out in that neighborhood is basically agriculture, is it not? A. It is.

Q. All right. Were you employed at the Unity Farm on the 10th of January? A. I was.

Q. And were you on patrol that early morning? A. Yes.

Q. Now, did anything unusual happen while you were on patrol? A. Yes, there was. Early in the morning I was making my usual rounds, traveling west on Colborn Road, when I sighted a car parked on the north side of the road in an oat field behind a trimmed hedge fence.

Q. About what time was that sir? A. That was at 4:10.

Q. And when you sighted this car, tell the Court and jury what you did, sir? A. I immediately pulled into the field and got out and checked the car to see who was around, if anyone. Also made a note of the license number and the time I done this.

122 Q. I see. And what kind of a car was that? A. It was a '59 Black Chevy, license number Missouri 737-312.

Mr. Harrington: Say that again.

The Witness: '59 Chevy, Missouri 737-312.

Q. (By Mr. Furry) Now, was there anybody in the vicinity at the time you checked this car the first time? A. No, there was not.

Q. Now, the property you are talking about is that the property of Unity Farm? A. Yes, it is.

Q. And what is that area used for? A. Well, there is an oat field there. North to that is a slight wooded area and a lake.

Q. All right. Now, after checking this car, what did you then do? A. Well, I looked the area over with a spot light around the field, failing to see anyone I drove up and down the highway a short distance on each side of this car. Knowing it was close to morning I supposed the peo-

ple would be back to the car. Each time going by I would throw my spotlight out into the field.

Q. Did you see anybody on these trips back and forth? A. I had made possibly five trips, maybe six, back and forth past the car, and as I was traveling east I sighted some reflection of headlights in my rear view mirror.

Q. When you say you were traveling east, on what road? A. Colborn Road.

123 Q. Where were you when you saw this reflection of lights in the mirror? A. I was just passing the spot where the car was.

Q. What did you then do? A. I drove on down the road east and turned around. And I was hurrying to turn around before this car caught up with me and turned around and started back west again, and I failed to meet up with this car so as I approached the car, where the Chevy was at, I directed my spotlight over in that direction.

Q. All right. And what did you see at that time? A. I saw an Oldsmobile, green Oldsmobile, sitting out into the field. There were two men on the opposite side, on the north side of the car, and I saw one man laying on the ground, with his head towards me.

Q. Now, where was this Oldsmobile in relation to the '59 Chevrolet? A. It was parked north of the '59 Chevy.

Q. In the field you have been telling us about? A. Yes.

Q. About how far north of the Chevrolet? A. Possibly two, three car lengths distance.

Q. Now, the two men you saw were on the left side of the car? A. That is right.

Q. As you looked at the car? A. Yes.

124 Q. And what direction would you be looking at that time? A. Looking north.

Q. What direction was this Oldsmobile headed? A. East.

Q. And this other man you say was on the ground? A. Yes.

Q. Where was he in relation to the Oldsmobile? A. He was on the right side, be on the south side of the Oldsmobile, possibly six foot.

Q. Now, did you observe the two men that were on the left? A. Yes, I immediately drove into the field and directed the spotlight back to the car or to where this guy was lying on the ground, and failing to see him I directed it back on the two men running across the field.

Q. As I understand, after you first throwed your spotlight on the field and saw these three individuals, you then turned into the field, is that correct? A. Yes.

Q. Did you go all the way into the field? A. I drove into the field, yes.

Q. You then flashed your light where you saw this man on the ground? A. Yes.

Q. What did you see at that point? A. I saw no one.

Q. Then you turned your light which way? A. I directed my spotlight back to the north across the field
125 in the direction the two men were running.

Q. How far were they away from you as they were running, approximately? A. Oh, maybe 75 foot.

Q. Running away, toward the north? A. Yes, running north.

Q. What is on the north edge of this field that we have been talking about? A. It is bordered by a multiflora rose fence.

Q. How long did you continue to watch the two men as they ran north? A. I watched them until they were out of sight.

Q. Could you see them all the way up to this multiflora rose fence? A. I believe I could, yes.

Q. Now, after they went out of sight, then what did you do, sir? A. Well, I searched with my spotlight the surrounding area looking for this other man who was lying on the ground. Failing to locate him I went down to the dairy a short distance down the road where there were two men working. I talked to them a while, told them what I had come across, and the two cars, and all, and they got in the truck with me and we went back up to where these cars were at.

Q. About what time was this? A. This was at 4:30 when I spotted this Oldsmobile.

Q. I see. And it was dark, I take it, at that time?
126 A. Yes.

Q. All right. When you got up to the field, with these two men, what did you do and what did you see? A. We talked a while about the situation and noticing this object out in the field slightly behind the Oldsmobile, got out and discovered it was a shotgun. We found a .12 gauge shotgun.

Q. Where did you find the shotgun? A. Laying to the left rear bumper of the Oldsmobile about six foot away.

Q. Mr. Westerfield, I hand you State's Exhibit No. 7 and ask you to take a look at that and identify it. A. Yes, sir, that is the gun I found.

Q. Did you make any identifying mark on that weapon? A. I have my initials here, "C.C.W." and it is dated 1-10-60.

Q. You placed those initials on yourself? A. I did.

Mr. Furry: At this time I offer into evidence State's Exhibit No. 7.

Mr. Harrington: No objection.

(State's Exhibit No. 7 was received in evidence.)

Q. (By Mr. Furry) All right. After you found the shotgun, then what did you do? A. I taken these two men back to the dairy, came back to this spot immediately, and on my radio called my dispatcher and reported these license numbers, and he called the State Patrol,
127 Highway Patrol, and got a car check on them.

Q. You have your own radio station there at Unity? A. Yes, we do.

Q. That is the one you are referring to? You have one in the car and you called the dispatcher at the tower? A. Yes.

Q. After reporting what you found there to the State Patrol, then what did you do? A. I was told to stay there and the State Patrol would be out to investigate.

Q. Did they arrive? A. They did.

Q. Do you know the State Patrolman, the name of the patrolman that arrived? A. Yes, Trooper Millsap.

Q. That is Dewey Millsap? A. Yes, sir.

Q. Let me ask you this. At the time you first discovered the Chevrolet it was headed in what direction now? A. The Chevrolet was headed west.

Q. In this field? A. Yes.

Q. And you said the Oldsmobile, I think, was headed east? A. That is right.

Q. Northeast? A. That is right.

Q. What was the condition of the Oldsmobile when you found it after you had seen these men? A. The car doors were all open, wide open.

128 Q. All four of them? A. Four doors were open.

Q. Did you touch anything on those cars, either one of those cars, until Trooper Millsap arrived? A. No, I didn't look in the cars. I didn't search them. I was just looking for the men.

Q. And except for the time you had gone down to the dairy to get those two men and take them back, you were there in the field? A. Yes.

Q. Was there anybody else in the field besides yourself and these two men? A. No.

Q. Now, after Trooper Millsap came, tell the jury what happened, what was done? A. Well, I had not much more to do with it, hardly anything. It was all turned over to Trooper Millsap at that time. The rest of the investigation.

Q. Were you able to identify the men that you saw in the field? A. No, I couldn't identify them.

Mr. Furry: All right. Thank you.

Cross Examination

By Mr. Harrington:

Q. You saw only three men? A. Yes, sir.

Mr. Harrington: That is all. Thank you.

(Witness excused.)

Charles A. Gardner,

called as a witness on behalf of the State, being duly
129 sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. I am Charles A. Gardner of 108 O'Brien, Lee's Summit, Missouri.

Q. What is your occupation, Officer Gardner? A. I am an officer of the Lee's Summit Police Department.

Q. How long have you been with that department? A. Past five years.

Q. Were you employed for them on the 10th day of January of this year? A. I was, sir.

Q. Officer Gardner, did you have occasion to investigate an incident that allegedly occurred at the Gladson home that morning? A. I did.

Q. When did you first receive the report? A. The morning of January 10 at approximately 4:45.

Q. Where was that? A. At the Highway Patrol station.

Q. Did you take part in the investigation? A. I did, sir.

Q. All right, sir. Now, without going into anything that was said between you and anybody involved in this case, or any witness in this case, after you received a call at Troop A, where did you then go? A. I went to the Gladson residence.

130 Q. Did you there discuss the situation with some people there? A. I did, took a full report.

Q. After taking your report there at the Gladson home, then where did you go, sir? A. I went to patrol over the city of Lee's Summit, and ended up at Unity after I received a message that the stolen car was found near Unity.

Q. That was the field at Unity Farm just off Colborn Road? A. Yes, sir.

Q. Did you take part in the investigation out there? A. I only stopped at the parked car and then went to Unity to patrol in Unity.

Q. Did you patrol there that morning? A. I did.

Q. Now, Officer Gardner, during the course of your investigation did you search the area near or about these cars? A. During the day and then the next two days I did.

Q. Now, did you find any physical objects while conducting your search? A. I found a pair of brown leather gloves containing a diamond ring, man's diamond ring.

Q. All right, sir. Where did you find them? A. They were north of the parked car in the field.

Q. Were they in the field or where were they in relation—what is the north boundary of this field? A. There is a fence, fence row, and it was just north of this

131 fence row in what I consider a pasture, brush and blue grass pasture.

Q. That would be the field, so we get this clear, on the north side of this hedge row and the field immediately north, adjacent to the field, where the cars were, is that right, sir? A. That is right.

Q. About how far north of this hedge row? A. Approximately 150 feet, something like that, north of the hedge row.

Q. Officer Gardner, I hand you State's Exhibit No. 12, which is a ring, and State's Exhibit No. 13, a pair of gloves, and ask you to take a look at them and identify them. A. Those are the gloves and this is the ring.

Q. Those are the gloves and the ring which you found at the place you have told us about there north of this hedge row? A. That is right.

Q. When did you find those? A. This was on Monday morning that I found—I believe Monday morning.

Q. You mean the day following? A. The following day.

Mr. Furry: At this time I offer into evidence State's Exhibit 13. State's Exhibit 12 already being in evidence.

Mr. Harrington: No objection.

The Court: Very well.

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132 (State's Exhibit No. 13 was Received in Evidence.)

Q. (By Mr. Furry) All right, sir. Now, will you just tell the jury exactly where you found the ring in relation to the gloves? A. The ring was in the little finger—the ring was placed in the little finger of the left hand glove.

Q. In other words, it was inside the glove? A. It was still inside the glove of the little finger.

Q. Now, did you find any other physical objects there? A. I didn't, no, sir.

Mr. Furry: That is all. Thank you.

Mr. Harrington: No questions, Officer.

(Witness excused.)

Carl Foster,

called as a witness on behalf of the State, being first duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. Carl M. Foster, 9924 East 38th Street, Kansas City, Jackson County, Missouri.

Q. Your occupation, Mr. Foster? A. I am a deputy sheriff, Jackson County.

Q. Were you employed as a deputy sheriff on the 10th day of January this year? A. I was.

Q. Did you have occasion to take part in the in-
133 vestigation of an incident that allegedly occurred in the Gladson home? A. I did.

Q. All right. Where were you on January 10, what was your assignment? A. I was to attempt to locate three or four subjects that had allegedly held up six people in Lee's Summit.

Q. Was that your area or district that you were patrolling at that time? A. I don't have a district. I have the whole county, no particular district.

Q. How did you receive the call? A. We received the call on the radio that there had been a hold-up.

Q. On your car radio? A. That is right.

Q. And then you proceeded to Unity Farm? A. Yes.

Q. Where did you go first? A. The first call we got was to attempt to locate a car that was taken in the hold-up. The second call was that the car had been abandoned in a field just east of 50 Highway and just north of Colborn Road, and there were some men had been seen leaving the car running, and we got the call to go out and attempt to find these men.

Q. Did you search the area? A. I did.

Q. Did you find anything out there? A. About 50
134 feet north of the cars in the field there was a bandana laying on the ground, a red and white bandana, and about 300 feet north of the cars at a hedge row, an opening in the hedge row, there was $132.00 and a brown felt hat laying at the opening.

Mr. Harrington: The money was in the hat, you say?

The Witness: No, sir. The money and a hat.

Q. (By Mr. Furry) This is the hedge row to the north of where the cars were in this field, is that right? A. That is correct.

Q. On which side of the hedge row did you find them? A. On the south side.

Q. All right. Now, this money, describe the money that you found. A. It was currency. There was five ten dollar bills, fifteen five dollar bills and seven one dollar bills.

Q. All right. And how were they laying on the ground, describe that. A. They were scattered out in an area about that big (indicating).

Q. You are indicating with your hands an area about 18 inches? A. About a foot and a half, that is right.

Q. Where was the hat in relation to the money? A. Lying right beside the money.

(State's Exhibit No. 18 was marked for identification.)

Q. Officer Foster, I hand you State's Exhibit No.
135 18, tell us what that is. A. This hat has my initials and the date, 1-10-60.

Q. Who placed those initials in there? A. I placed them in there at the time I found the hat.

Mr. Furry: I offer in evidence State's Exhibit No. 18.

Mr. Harrington: No objection.

(State's Exhibit No. 18 was received in evidence.)

Q. (By Mr. Furry) All right, sir. Now, after you found the money and the hat, then what did you do? A. I turned them over to Trooper Millsap, State Highway Patrol, and continued searching the area.

Q. When you say searching the area, you mean the area around the cars and the vicinity? A. The vicinity.

Q. That would be in your patrol car? A. Yes, sir.

Q. There were other police officers patrolling the area, also? A. There were.

Q. And you continued in your search until about what time? A. I believe about eight o'clock or a little after when we received word they had picked up four subjects and I discontinued my search.

Mr. Furry: Thank you. That is all I have.

Mr. Harrington: No questions.

(Witness excused.)

Dewey E. Millsap.

called as a witness on behalf of the State, being duly
136 sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address please, sir? A. Trooper D. E. Millsap, Lee's Summit, Missouri.

Q. And you are with what troop? A. Troop A.

Q. Where is that located? A. Lee's Summit, Missouri.

Q. And how long have you been on the State Patrol? A. Since July 1st, 1946.

Q. And were you employed in that capacity on the 10th day of January of this year? A. I was.

Q. Did you have occasion to investigate an incident that occurred at the Gladson home? A. I assisted. I didn't go to the home.

Q. But you had something to do with it in regard to the report you received, is that right? A. Yes, sir.

Q. What time did you receive your report? A. I first received the information about 4:45 a.m.

Q. Where was that? A. I was at our office at Lee's Summit.

Q. All right. What did you then do? A. I started working north out of Lee's Summit, working side roads.

Q. All right. Just tell us what you did. What happened that morning when you started working the
137 side roads? A. I received information at our office of the hold-up, and I figured maybe they set the car down, the one they took from Mr. Roberts, on a side road north of town, so I started working the side roads north of Lee's Summit until about 5:17 a.m. I received a call from the office saying the car had been found on Colborn Road at Unity Farm.

Q. Then what did you do? A. I proceeded to that location, and arrived about 5:25 a.m.

Q. Did you meet anybody at that time? A. Yes. When I arrived Mr. Westerfield, Unity Patrolman, was there and also Glenn Grantham of the Jackson County Sheriff's office was there.

Mr. Harrington: Who?

The Witness: Grantham.

Q. (By Mr. Furry) All right. When you arrived there at the field, what did you find? A. I found two cars, a green 1952 Oldsmobile, which was abandoned out in the field headed northeast. It was a four-door sedan. All four doors were open. Also a black 1959 Chevrolet sedan. It was headed west setting just inside a hedge fence.

Q. All right. What did you do after arriving and observing the two cars? A. I closed the doors on the Olds-

mobile, and called the office and had the Burrow
138 Brothers to send two wreckers up to pick the two cars up, and I stayed at the scene until they arrived and picked the cars up.

Q. Did you touch anything on the cars, other than the four doors you closed? A. No, sir. I didn't touch the car except closing the doors.

Q. All right. Then the cars were towed to Burrow Brothers? A. That is right. They were towed in with instructions to lock the cars up until such time as we wanted to check them.

Mr. Harrington: I want to ask him a question to qualify him. Who did you give the instructions to, to lock the cars up?

The Witness: Both the Burrow brothers. They both came out, Leo and Cleo.

Q. (By Mr. Furry) They are twin brothers? A. Yes, sir.

Q. They have a tow-in garage in Lee's Summit? A. That is right.

(State's Exhibits Nos. 19 and 20 were marked for identification.)

Q. (By Mr. Furry) Officer, I hand you State's Exhibits 19 and 20, and ask you to take a look at them and identify them, please? A. This is a picture of myself inside the field where the black Chevrolet was abandoned, and this one is a picture of myself at about the spot where the Oldsmobile was abandoned.

Q. Now, of course, the cars are not shown in that photograph, are they? A. No, sir.

139 Q. When was that photograph taken? A. This photograph was taken not too long ago.

Mr. Harrington: Did you take the photographs?

The Witness: No, I didn't take them.

Mr. Furry: He knows when they were taken. He appears in them.

Q. (By Mr. Furry) Now, do the physical objects that are shown on those photographs fairly and accurately portray the objects as shown there? A. Yes, sir.

Q. And are they the same or similar to the conditions that you found there that morning on January 10? A.

They appear to be the same except the ground has been cultivated before these pictures were made.

Q. You mean it was cultivated when? A. Before these two pictures were made. Since the cars were taken away.

Q. All right. But the ground, the terrain and physical objects shown in them are the same? A. Yes. The timber, fence, road, buildings in the background are the same, yes, sir.

Mr. Furry: I offer into evidence State's Exhibits 19 and 20.

Mr. Harrington: Do you know the date these pictures were taken?

The Witness: Not exactly.

140 Mr. Harrington: Approximately?

The Witness: It has been about a month. I couldn't say for sure.

Mr. Harrington: Taken in the summertime?

The Witness: It was taken in the spring, yes, sir.

Mr. Harrington: And the day you found the cars was in the wintertime?

The Witness: That is right.

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(State's Exhibits 19 and 20 were received in evidence.)

Q. (By Mr. Furry) All right, sir. State's Exhibit No. 19, now that it is in evidence. Will you just explain for the jury's benefit exactly what that photograph shows? A. I am standing at about the location where the black Chevrolet sedan was abandoned behind this hedge fence here. This is Unity Farm, Unity Tower, in the background.

Q. And this is the field that you have described to us? A. Yes, sir.

141 Q. And what is this area right in here? A. That is the gate into the field.

Q. All right. And is there a road on the other side of that? A. That is right. Colborn Road.

Q. And that direction—you would be looking which direction? A. I am looking almost east.

Q. You are looking toward the camera, toward the east? A. That is right.

Q. So that this photograph is actually faced toward the west? A. That is right.

Q. Or the camera was? A. That is right.

Q. Now State's Exhibit 20. Just tell the jury what that is, please, sir? A. I am standing about the location where the 1952 Oldsmobile was abandoned. I am looking southwest toward the gate or the opening that leads out to the highway.

Q. All right. So the camera or this view is looking which direction? A. Northeast.

Q. All right. Now, sir, after these cars were towed away, what did you then do? A. I started patrolling the area around Unity looking for suspects.

Q. And did you find anybody? A. Yes, sir.

Q. About what time did anything unusual happen? A. About 8:45 a.m. I was driving south on Highway 50.

142 At a point five tenths of a mile north of Colborn Road I saw Thomas Eugene Brown standing by a fence on the southwest side of Highway 50. He was looking west over into a field at the time I first saw him. I arrested Brown and put him in my car, or I searched him first, and then placed him in the patrol car and continued to search him.

(State's Exhibit No. 21 was marked for Identification.)

Q. Officer Millsap, I hand you State's Exhibit No. 21. Tell us what that is. A. That is a picture of myself standing about the location where I picked up Brown, Thomas Brown.

Q. Do the physical objects that appear in that photograph fairly and accurately represent what you saw there that morning? A. They do.

Q. With the exception of the change in foliage, I take it? A. Yes.

Q. This photograph was also taken sometime afterwards? A. That is right.

Mr. Furry: I offer into evidence State's Exhibit No. 21.

Mr. Harrington: Object for the same reason, Your Honor.

The Court: Overruled. It will be admitted as showing the location of the arrest of Brown.

(State's Exhibit No. 21 was received in evidence.)

143 Q. (By Mr. Furry) Now, would you just tell the jury what you see there? A. This is myself looking

west at this location. Highway 50 is in a curve bending to the south. I am looking just about due west across a fence into a field. At this location, Brown was standing about this location when I first saw him.

Q. And this object that appears in the background, what is that? A. That is Unity Tower at Unity. This is Hazel Grove School.

Q. Where is Colborn Road or Bannister Road in relation to that? A. It is a half mile south.

Q. You say you stopped Brown or placed him under arrest at that point, is that correct? A. That is right.

Q. Did you search him? A. Yes, sir.

Q. What did you find when you searched him? A. Brown had on his person one billfold with miscellaneous papers, one pocket knife, one cigaret lighter, a comb, a set of keys, one Saint Christopher metal, one $20.00 bill, seventy cents in change.

Q. All right. Describe his physical appearance. A. Brown was wearing a kind of a brownish figured dress shirt, no coat, gray work trousers with the left leg badly torn, with the skin on his knee and leg scratched, and blood was oozing through the scratches on his leg. He had dirt on his shoes. He had what appeared to be two or three days' growth of beard on his chin and even had loose dirt
144 in his chin. It looked like apparently he had fallen down and run his chin in the dirt some place.

Q. After arresting him you placed him in your patrol car, is that correct? A. That is right.

Q. Was any other officer with you, or anybody with you at that time? A. No, sir.

Q. After you placed Brown under arrest and put him in your patrol car, what did you do? A. I continued looking until about 9:20 a.m. I was driving south on Noland Road about three-tenths of a mile south of Bannister. At the junction of Highway 50, west of 50 is Bannister Road, east of 50 it is Colborn Road, and Noland Road runs north off of Bannister. At a point three-tenths of a mile north of Bannister Road I men John Edward Johnson and Eric Lafe Larson walking north on the pavement.

Q. This was Sunday morning? A. Yes, sir.

Q. And will you describe the area, as to what this area is

used for, where you found these two men? A. It is farm area, farms on both sides of the highway.

Q. All right.

(State's Exhibits 22, 23 and 24 were marked for identification.)

Q. Officer, I hand you State's Exhibits 22 and 23, first of all, and ask you to identify them. A. These are pictures taken of myself about the location where Johnson and Larson were arrested.

145 Q. All right. Do the physical objects that appear there fairly and accurately portray what you found there that morning? A. They do.

Q. Except the change in foliage we talked about before? A. Yes, sir.

Mr. Furry: I offer into evidence State's Exhibits 22 and 23.

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146 (State's Exhibits 22 and 23 were received in evidence.)

Q. (By Mr. Furry) Officer Millsap, State's Exhibit 22 here, first of all, just tell the jury again, now that it is in evidence, exactly what this picture shows. A. This is a picture of myself on the pavement about the location where Johnson and Larson were picked up. They were walking north. I am facing north. The picture is made looking east, almost east, just a little bit to the south.

Q. You are headed in what direction? A. I am headed north. Same direction they were walking.

Q. Does the Unity Tower appear in that photograph? A. It does.

Q. Where is it, exactly? A. Right here (indicating).

Q. That is just the very top? A. Just the tip of it.

Q. And this road or pavement slab that appears in the photograph, what street is that? A. That is Noland Road.

Q. Running north and south? A. That is right.

Q. All right. Now, sir, State's Exhibit No. 23. A. This is a picture of myself looking north at the same location. This picture is facing more southeast, looking southeast.

147 Q. Now, as you go from the point where you are standing and go toward the south, what happens to

the road there? A. Noland Road dead ends three-tenths of a mile south of this point at Bannister Road.

Q. And Bannister Road runs which direction? A. East and west.

Q. Now, is there an area on that photograph or place where they were cutting a new road at the time? A. Yes, sir.

Q. Or have since that time? A. Yes, sir. The new road is cut through right here by these poles. These light poles recently have been placed here for power for this new rock quarry and the rock quarry is just south. You can see part of the hill has been cut away where they have been digging.

Q. Do you know the distance from where Colborn Road and Bannister intersect to this road going into the quarry? A. I don't know exactly. I would say about three-tenths of a mile. It is about the same distance from there to the intersection as it is from the intersection to where I am.

Q. That would be your best estimate or judgment? A. That would be my best estimate.

Q. All right. I hand you State's Exhibit No. 24 and ask you to identify that, if you can. A. This is a pic-
ture on Bannister Road looking east. Bannister
148 Road is starting up-hill around a curve and curves back to the right and hits Highway 50.

Q. Just identify it at this time. A. It is a picture of Bannister Road at the entrance to the new rock quarry.

Q. Do the objects that appear on that photograph fairly and accurately portray the physical objects shown therein? A. That is right.

Q. And as shown on January 10 of this year? A. Yes, sir.

Q. Except for the change in the foliage as we previously discussed? A. That is right.

Mr. Furry: I offer into evidence State's Exhibit 24.

Mr. Harrington: No objection.

(State's Exhibit No. 24 was received in evidence.)

Q. (By Mr. Furry) All right, Trooper Millsap, State's Exhibit No. 24, just show the jury what that is. A. This is Bannister Road going east up the hill. The road starts up a hill and curves around and back to the right and up to Highway 50. This is a new road into the rock quarry

which is back here to the south. This is about, I would estimate, three-tenths of a mile east of Noland Road back this way.

Q. All right, sir. Fine. Now, when you arrested Larson and Johnson, just tell the Court and jury what you
149 did. A. I searched both of them.

Q. All right. Tell us what you found. A. Johnson was wearing a pair of green coveralls and a matching green shop cap. He was wearing brown dress-type shoes, and a gray gabardine zipper type jacket. He was searched. He had a pair of leather gloves. He had a comb, and a total of $270.55. The bills were rolled up in a loose roll in his left front coverall pocket. He had loose dirt on his shoes. Larson was wearing a white shirt, a pair of gray dress-type trousers, and brown shoes, and also a gray zipper type jacket. The jacket was torn on the left sleeve on the shoulder, and also the right sleeve at the elbow. He was bare-headed. Larson was bare-headed. He had on his person one folding type wallet, miscellaneous papers, one collar pin, one pair of nail clippers, one key, and a total of $172.75.

Q. Then did you take charge of that property? A. I did.

Q. And what did you do with the money after you searched them and took the property? A. I put the property in my patrol car and made them stand outside my patrol car while I called the office, and the office sent another car with Sergeant Roberts and picked up Johnson and Larson an we took them all into our office.

Q. All right. Trooper Millsap, I am going to hand
150 you State's Exhibits 9 and 10, and ask you to take a look at them? A. This is one of the one dollar bills Johnson had in his front coverall pocket, rolled up with the other bills.

Q. You are referring to State's Exhibit No. 9? A. Yes.

Q. All right. And that was taken from his possession that morning, is that correct? A. That is right.

Q. Did you make any identifying mark on this bill? A. Yes, sir. I put my initials right here on the left top—left-hand corner and the date.

Q. All right. Fine. Now State's Exhibit 10, I believe. A. Yes, sir. This is also a one dollar bill I took from Johnson. It came from his left coverall pocket, front

coverall pocket, among a roll of bills. It also has my initials and the date on it.

Q. All right. Now, let's see for the record, State's Exhibit No. 9 has the following serial number, "W-96863956I." State's Exhibit 10 has the following serial number, "07491869B." A. That is right. I didn't catch the first one. Read that again.

Q. You made a record of that at the time? A. Yes, sir.

Q. That was W9686396I. A. That is right.

Mr. Furry: All right. I think they might be in evidence, but I will re-offer State's Exhibits 9 and 10.

The Court: 10 is in. You have not offered 9.

151 (State's Exhibit No. 9 was received in evidence.)

Q. (By Mr. Furry) And what did you do after you took these men to Troop A? A. Sergeant—

Q. You and Roberts took them to Troop A? A. That is right. Mr. Roberts, that is Mr. Ray Roberts, one of the victims, and Mr. McClendon came to the office a second time that morning and stated they could identify—

Q. Now we are not going into any conversation. You just took the men back to Troop A, is that right? A. Yes.

Q. And continued your investigation? A. That is right.

Mr. Furry: All right. I believe that is all.

Mr. Harrington: No questions, Trooper.

(Witness excused.)

The Court: Let's have a short recess.

(Recess)

Tom Ferguson.

called as a witness on behalf of the State, being first duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. Trooper Tom Ferguson, Lee's Summit, Missouri.

Q. And you are with what organization? A. Missouri State Highway Patrol.

152 Q. How long have you been with them? A. Since June 15, 1952.

Q. Were you employed by them on January 10 of this year? A. Yes, sir, I was.

Q. Did you have occasion to take part in the investigation of an incident that allegedly occurred at the Gladson home on January 10? A. Yes, sir, I did.

Q. All right, sir. What time did you receive the call? A. At 8:00 a.m. on January 10.

Q. Where were you at that time? A. I was home in bed.

Q. After you received the call, what did you do, sir? A. I hurriedly dressed and went to my patrol car.

Q. Then what did you do? A. I drove to U.S. 50 Highway and started northwest on U.S. 50 Highway toward Unity Village.

Q. As you proceeded north on Highway 50, tell the Court and jury what you saw and what happened. A. At a point four-tenths of a mile or six-tenths of a mile south of the intersection of Colborn Road and U.S. 50 at Unity Village, I observed a man coming up the drainage ditch onto the shoulder of Highway 50, on the east side of the highway, and start walking north on the east shoulder. The man was dressed in a white shirt and pair of dress slacks.

153 At that time I pulled off the highway behind the subject, and got out of my patrol car, and as he turned around I recognized the subject to be Bobby Fred Ashe.

Q. That is the defendant in this case? A. Yes, sir, that is.

Q. When you saw Bobby Ashe, what did you do? A. At the time he turned around, why, I told him that he was under arrest, and he made a quick movement behind him with his left hand, and I pulled the service pistol and told him he was under arrest and to put his hands over his head, and then I searched him for a weapon and I didn't find any, and I handcuffed him and put him in my patrol car.

(State's Exhibit No. 25 was marked for identification.)

Q. Trooper Ferguson, I hand you what has been marked State's Exhibit 25 and ask you to take a look at it and identify it, if you can. A. This is a picture of U.S. Highway 50. It is the northbound side of the divided highway. It is the east shoulder of the highway, and the person standing there is myself.

Q. Do the objects that appear in that photograph fairly and accurately portray the objects that were there that morning of January 10? A. Yes.

Q. With the exception perhaps of the change of vegetation? A. Yes, sir, that is right.

Mr. Furry: I offer in evidence State's Exhibit No. 25.

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154 (State's Exhibit No. 25 was received in evidence.)

Q. (By Mr. Furry) Trooper Ferguson, I want you to again explain this photograph to the jury. First of all, the person standing in this photograph is whom? A. That is me standing here on the shoulder.

Q. What point does that depict in the photograph? A. That depicts the point where I arrested the defendant.

Q. Where is the drainage ditch you talked about? A. It is this drainage ditch along here. It is along the fence line on the east side of the shoulder.

Q. When you first saw the defendant, what direction was he heading and which way was he going? A. He was coming up the shoulder, which would be west, to the highway, and he turned and started walking up the road in this position I am.

155 Mr. Harrington: Which direction was he walking?

Mr. Furry: After he turned he went from west to north.

Q. (By Mr. Furry) This area over here to the right in the photograph, what is that? A. It is a field and past that is a wooded area, and it goes on back into some more woods and some orchard over in there.

Q. And this slab that is shown on here is what? A. That is the northbound side of the divided highway of U.S. 50.

Q. And this object shown here in the left corner, what is that? A. That is the Unity Village tower.

(State's Exhibit No. 26 was marked for identification.)

Q. Trooper Ferguson, I hand you what has been marked State's Exhibit No. 26 and ask you to identify that, please? A. This is the shirt and the trousers that were worn by Bobby Ashe at the time I arrested him.

Q. All right. Did he have on any clothing other than that? A. No, sir.

Mr. Harrington: Shoes?

Mr. Furry: I mean on the upper part of his body.

Q. (By Mr. Furry) Any jacket or anything like that? A. No.

Q. What type of shirt is that? A. Well, it is a
156 white dress shirt, pinch collar and French cuffs on it.

Q. What are these holes used for up here in the collar? A. That is used to pinch the collar at the neck.

Q. Did he have a necktie on? A. No.

Q. Did he have any cuffs on? A. No, they were loose like they are now.

Q. There is a stain on the rear of the shirt? A. Yes. There was a stain of cow manure or horse manure on the back of the shirt. It was fresh at that time.

Q. Except for the fact that it is not fresh, the shirt and clothing are the same, are they? A. Yes.

Mr. Furry: I offer in evidence State's Exhibit 26.

Mr. Harrington: No objection.

(State's Exhibit 26 was received in evidence.)

Q. (By Mr. Furry) Now this is in evidence, sir. Again, this discoloration on the back of the shirt, explain to the jury what that is, sir. A. Well, it is manure, cow or horse manure, and at the time it was fresh on the shirt, at the time of the arrest.

Q. All right. And there are also some stains on the front of the shirt? A. Yes, these were wet blood stains on the front up here by the lapel.

Q. Will you describe the physical condition of the
157 defendant when you arrested him? A. Well, Mr. Ashe looked like he had run or walked some distance.

Q. What lead you to that conclusion? A. His clothes were in disarray at the time, he was walking hurriedly, his hair was mussed, and he was breathing rather hard, and he had a laceration on his tongue.

Q. Describe the tongue and the situation in regard to that. A. He showed me his tongue. He had a laceration back on the tongue, more in the middle part, it looked to me like, and it still has sutures in the tongue, and it was causing him—it was bleeding, and he kept spitting this blood from this lacerated tongue. It was swollen and made it hard for him to talk.

Q. How did it affect his speech? A. He didn't talk too coherently, talked sort of like he had a mouthful of something, something in his mouth, sort of a mushy sort of speech. His tongue was swollen quite a bit. It was giving him—he kept telling me it was giving him some pain.

Q. What time was this now? A. At the time of the arrest?

Q. Yes. A. It was about 8:20 to 8:25.

Q. How would you describe the weather conditions at the time of the arrest? A. It was cold. It was a
158 regular January day. It was not freezing temperature. I can't guess about how the temperature was. It was cold, just above freezing, I would say.

Q. All right. Now, you say you searched the defendant, is that correct? A. Yes, sir, I did.

Q. Did you find any objects on his person at that time? A. No, sir, I didn't.

Q. Now, just tell us how you made your search, what you did when you searched the defendant? A. I placed his hands on the car and stretched him back, and then I searched him for a weapon, I searched from his armpits down, without going into his pockets, and I searched his ankles to make sure he didn't have any type of weapon detrimental to my safety on him at that time. I did have his billfold in my possession. I took his cards from his billfold.

Q. All right. You didn't disrobe him there at that time, did you? A. No, sir, I didn't.

Q. After you got him in the patrol car, where did you then go? A. Drove to Unity Village intersection to meet with Lieutenant Keith, who was in charge of the operation of the search there. He directed me to drive the subject back to Patrol Headquarters, which I did, to the junction of 71 by-pass and Highway 50.

Q. That is Troop A south and east of Lee's Summit? A. That is correct.

Q. Now, when you got out there—you were out there when several men were brought out to headquarters, were you? A. Yes, sir, I was.

159 (State's Exhibit No. 27 was marked for identification.)

Q. (By Mr. Furry) Trooper Ferguson, I hand you what has been marked State's Exhibit No. 27 and ask you to identify this. A. These are fingerprints, complete, that I took from John Edward Johnson on January 10, 1960. They were taken at the Highway Patrol Headquarters.

Q. I notice the signature at the bottom of the card or on the card. A. That is mine. Officer's signature taking the prints. That is my signature.

Q. And there is another signature to the right. A. That is the signature of John Edward Johnson. I was present when he made the signature.

Mr. Furry: I offer in evidence State's Exhibit No. 27.

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(State's Exhibit No. 27 was Received in Evidence.)

160 Mr. Furry: I believe that is all. You may inquire.

Cross Examination

By Mr. Harrington:

Q. Officer, at the point Mr. Ashe was arrested, how far was that from this intersection you spoke of driving to at Unity? A. Six-tenths of a mile.

Q. Was that towards Kansas City? A. Do you mean from the intersection?

Q. Where Mr. Ashe was arrested, then you drove toward this intersection you were talking about? A. That was towards Kansas City.

Q. Let me ask you this first. The Missouri State Highway Patrol has laboratory facilities, have they not?

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A. Yes, sir, they do.

Q. Did you ever have these stains analyzed? A. No, we didn't.

Mr. Harrington: That is all.

Redirect Examination

By Mr. Furry:

Q. Trooper, were you able to identify those stains
161 without having them analyzed? A. Yes, sir. It was very apparent they were manure stains.

Mr. Furry: I believe that is all. Thank you, sir.
Mr. Harrington: No further questions.

(Witness excused.)

(State's Exhibit No. 28 was marked for identification.)

Mr. Furry: At this time, Your Honor, I am offering into evidence State's Exhibit 28, report of the Weather Bureau.
Mr. Harrington: I have no objection.

(State's Exhibit No. 28 was received in evidence.)

Mr. Furry: I will read these to the jury at this time. I am now reading from State's Exhibit 28, which is in evidence. "United States of America, United States Department of Commerce, Weather Bureau. Station Kansas City, Missouri. Date 6/22/60. I hereby certify that the below is an official true copy of a United States Weather Bureau record. At Kansas City, Missouri, January 10, 1960, the temperatures recorded were as follows: Midnight 39 degrees. 12:55 a.m. 39. 1:55 a.m. 40. 2:55 a.m. 40. 3:55 a.m. 41. 4:55 a.m. 40. 5:55 a.m. 40. 6:55 a.m. 40. 7:55 a.m. 40. 8:55 a.m. 39. 9:55 a.m. 40. 10:55 a.m. 42. 11:55 a.m. 43."

162 **D. P. Buehler.**

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. Trooper D. P. Buehler, State Patrol, Lee's Summit, Missouri.

Q. Trooper Buehler, how long have you been with the State Patrol? A. Five years in September.

Q. Were you with them on January 10 of this year? A. Yes, sir.

Q. Were you present at Troop A Headquarters when the defendant, Bobby Ashe, was there? A. I was.

Q. Did you see him at that time? A. I did.

Q. What kind of clothing was he wearing? A. I particularly noticed his shirt. He was wearing a white shirt with French cuffs that were open.

Q. Did you notice any marks on the shirt or stains? A. Yes, sir. On the back right shoulder of the white shirt there were two brown stains, one large one and one rather small one.

Q. All right. I hand you what has been marked State's Exhibit No. 26, which is in evidence, and ask you to look at that and identify it. A. This is the shirt he was wearing on the morning in question.

163 Q. And the stain you refer to, would you point that out to the jury, please? A. This was the large one I referred to, and the small one up above it at the seam.

(State's Exhibit No. 29 was marked for identification.)

Q. Trooper Buehler, I hand you what has been marked State's Exhibit No. 29 and ask you to identify it. A. This is a blue shirt I found later on in the day hanging over a weed located on 50 Highway about four-tenths of a mile south of Bannister Road.

Q. Is that shirt in the condition that it was when you found it that morning? A. Yes, the stain was somewhat wet at that time, but it is the same stain.

Q. You are referring to the stain on the right rear shoulder, the two stains? A. Yes.

(State's Exhibit No. 30 was marked for identification.)

Q. State's Exhibit 30, will you take a look at that, please, sir, and identify it? A. This is a picture of the location where this blue shirt was found. It was taken in the direction headed north. Unity Village can be seen in the background.

Q. Without showing it to the jury, there is a man in the photograph? A. Yes.

Q. Who is that? A. That is myself.

164 Q. Do the physical objects that appear on that photograph fairly and accurately portray what you saw there that morning of January 10? A. Yes.

Q. Except for a possible change in foliage? A. That is right.

Mr. Furry: At this time I offer in evidence State's Exhibits 29 and 30.

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(State's Exhibits 29 and 30 were received in evidence.)

Q. (By Mr. Furry) Trooper Buehler, this photograph that you have identified, again for the jury's benefit, just tell them what it is while they can see it. A. This is a picture of the location where this blue shirt was found hanging on a weed right to my left. This is the weed this shirt was hanging on.

Q. This was found at what time? A. This was found at 2:30 p.m. on January 10.

Q. That was some—what, six hours after this man had been arrested? A. I don't recall what time he was arrested. It was in the afternoon.

165 Q. It was in the afternoon of the same day the men were at Troop A Headquarters? A. That is correct.

Q. When you saw the defendant at Troop A, he was wearing this shirt with the stain as indicated here, is that correct? A. That is correct.

Q. All right. Now, show us again the stain on that blue shirt. A. The stain on this blue shirt is at approximately the same location as the one on the white shirt.

Q. And you say that was wet at the time you found it? A. It was somewhat moist at the time.

Q. Were you able to identify definitely what that was? A. Yes, it was manure. What type, I don't know.

Q. O.K. Now, this shirt, I notice no label in the back, there is no label in the back. Was it in that condition when you found it? A. Yes. No label on it.

Mr. Furry: You may inquire.

Mr. Harrington: I have no questions.

(Witness excused.)

George Murphy,

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

166 Q. Will you state your name and address, please, sir? A. George Murphy, Lizzy Ann Trailer Court, Belton, Missouri.

Q. What is your occupation? A. Lineman for the Southwestern Bell Telephone Company.

Q. Were you employed with them back in January, particularly January 10 of this year? A. Yes, sir.

Q. Where were you working on that date? What area were you working, where were you working? A. Which date?

Q. Pardon me. During the month of January? A. Yes, sir.

Q. Let me hand you this, which is already in evidence, State's Exhibit No. 8 and ask you if you have ever seen that? A. Yes, sir.

Q. And where did you first see it? A. Over approximately Bannister and Noland Road.

Q. And in Jackson County, Missouri, is that right? A. Yes, sir.

Q. All right. Where was it when you found it and when did you find it? A. Well, I found it on the 28th day of January, 1960. I found it in the ditch line just east of Noland Road on Bannister.

Q. All right. What were you doing on that date? A. We were setting a telephone pole over there.

Q. What was the condition of the billfold when you found it? A. Well, it was wet. It had been raining, sleeting.

167 Q. I hand you what is already in evidence, State's Exhibit No. 24, and ask you to identify that photograph, if you can. A. Yes, sir. This is Bannister Road coming down here and this is the entrance to the new rock quarry here, and we had set this new pole here to clear our line across the entrance here.

Q. Does this area—would it show the place or the point where you found that billfold? A. Yes, sir.

Q. Would you please point to it on this photograph? A. It would be approximately in this vicinity right in here (indicating).

Q. All right. There were some identification papers in the billfold, were there? A. Yes, sir.

Q. Did you determine who the owner was? Yes, sir.

Q. Who was that? A. Mr. Knight.

Mr. Furry: Thank you, Mr. Murphy.

Mr. Harrington: No questions.

(Witness excused.)

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. State your name and address, please, sir. A. Leo Burrow, Third Street and 50 Highway.

168 Q. What is your occupation, Mr. Burrow? A. We run a small repair shop and 24-hour tow service.

Q. Who is "we"? A. Me and my twin brother.

Q. That is Cleo, is it? A. Cleo.

Q. Now, did you have occasion to go out to a field on Unity Farm on the morning of January 10 of this year? A. Yes, sir.

Q. What time did you get out there? A. We got out there a little after five o'clock. We received the call from the Highway Patrol.

Q. And when you got out to the field, what did you find? A. Found two cars.

Q. What kind were they? A. One a '59 Chevrolet and the other was a '51 or '52 Oldsmobile.

Q. All right. Now, did you meet anybody out there at the field? A. Yes, sir.

Q. Who was that? A. Patrolman Millsap.

Q. That is Dewey Millsap? A. Dewey Millsap of the Highway Patrol.

Q. All right. What did you and your brother do when you arrived—after you arrived? A. We waited there until Patrolman Millsap gave us orders to pick the cars up.

Q. All right. Did you do that? A. Yes, we sure did.

169 Q. What kind of equipment do you use? A. The very best, the Ernest Holmes equipment.

Q. Ernest Holmes equipment? A. Yes, sir.

Q. How does that work, sir? A. Very fine. They have slings that go underneath. I picked up the Oldsmobile from the rear. It has hooks that goes underneath the axle and comes out and hooks onto the sling. The car can't bounce. It is steady at all times.

Q. Did you use that equipment that morning on this Oldsmobile then and the Chevrolet? A. Yes, sir, we did.

Q. What did you do with the cars? A. We towed them into our garage and locked them up.

Q. This was Sunday morning? A. Sunday morning.

Q. And you locked the—did you put them inside the garage? A. Yes, sir, we sure did.

Q. And locked it up? A. Yes, sir.

Q. You say you locked it up, are you talking about the cars or the garage? A. The garage. We put the cars inside the garage and locked the garage up.

Q. Then what did you do? Did you later on open the door that morning? A. Yes, sir.

Q. Unlock the door? A. Yes, sir. Patrolman Place called me to come down and open up for him.

170 Q. About what time was that? A. Around 9:00 o'clock, 9:30.

Q. Did you then unlock the garage? A. Yes, sir, we sure did.

Q. Had the garage been unlocked any time from the time you brought the cars in originally early that morning until Trooper Bob Place was there and you let him in? A. No, sir.

Q. And what was done at that time? A. He searched the car and taken fingerprints on the automobiles.

Q. All right. Were the cars later taken outside? A. Yes, sir, in a fenced-in lot.

Q. Did you at any time when you had these cars in your custody and control open the doors or change anything about these cars? A. No, sir. We only shut the doors on the Oldsmobile.

Q. All right, sir. You were there with Patrolman Millsap when the doors were shut, is that right? A. Yes.

Q. How many doors were open?

Mr. Harrington: On which car?

Q. (By Mr. Furry) On the Oldsmobile. A. There was two open.

Q. When you got there? A. Yes, sir.

Q. That is a four-door car, is it not? A. As I remember it is, yes.

171 Mr. Furry: All right, fine. Thank you.

Cross Examination

By Mr. Harrington:

Q. You shut the two doors? A. Yes, sir. Patrolman Millsap gave me orders to.

Q. Which doors were they? The front doors? A. Front doors.

Q. The back doors were already closed? A. Yes, they were, sir.

Mr. Harrington: That is all.

(Witness excused.)

Robert G. Place,

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please, sir? A. Robert G. Place, Lee's Summit, Missouri.

Q. Your occupation, sir? A. I am a Missouri State Highway Patrolman.

Q. How long have you been on the patrol? A. About eighteen years.

Q. And you were on the patrol the 10th of January this year? A. Yes, sir.

Q. Trooper Place, what is your assignment out at
172 Troop A? A. I am an evidence technician. That is, I go out and take evidence, fingerprints, and so forth, after a crime.

Q. All right. Did you have occasion to examine two automobiles at the Burrow Brothers Garage on the morning of January 10? A. Yes, sir.

Q. What time did you arrive? A. About 8:30 in the morning.

Q. That was at the garage? A. Yes, sir.

Q. And when you arrived there what did you do? A. Well, there was a black '59 Impala Chevrolet sedan there, and I examined the outside of that for fingerprints. I found some fingerprints and palm prints on the back trunk lid in the vicinity of the lock. These were made in the dust or

dirt that was on the car, and I photographed those fingerprints and palm prints. I also examined the other parts of the car, the glasses and so forth, and made some fingerprint lifts. I found a pair of shoes sitting under the steering wheel on the floor. We obtained a key to the back trunk lid and opened the trunk and found a Kansas license plate in the car, and also a spare wheel and tire in the trunk, and that was about the extent of the examination of the Impala that was there.

Q. All right, sir. Fine. If you will wait a moment.

(State's Exhibits 31, 32 and 33 were marked for identification.)

173 Q. I hand you what have been marked as State's Exhibits 31, 32 and 33, and ask you to take a look at the three of them and identify them. A. This is a negative of one of the photographs I took of a fingerprint which was on the rear deck of the trunk of the '59 Impala Chevrolet there at Burrow's.

Q. When you say you take a fingerprint by a photograph, just so this jury and myself can understand more clearly, will you tell us how you actually get a fingerprint when you go out and process a vehicle or some object? A. Well, these fingerprints were left by the hand being placed in the dust which was on the car, and in order—the only way I could get those was to photograph them. I have a camera I use, and I actually took a photograph of the fingerprint there.

Q. Of the print in the dust there? A. Yes, sir.

Q. And State's Exhibit 31 is the negative of that photograph, is that correct? A. Yes, sir.

Q. All right. Did you have any identifying mark on it? A. Yes, sir. It has my initials on it.

Mr. Furry: I offer in evidence State's Exhibit No. 31 at this time, and I will connect it up later.

Mr. Harrington: I object unless he can connect it up.

The Court: It will be received subject to it being connected up.

174 (State's Exhibit No. 31 was received in evidence.)

Q. (By Mr. Furry) State's Exhibit No. 32, tell us what that is? A. This is a photograph of the '59—the black '59

Chevrolet Impala that was examined there at the Burrow's Garage.

Q. Does that photograph fairly and accurately portray what you saw when you looked at the car that morning? A. Yes, sir.

Mr. Furry: I offer in evidence State's Exhibit No. 32.

Mr. Harrington: I have no objection.

(State's Exhibit No. 32 was received in evidence.)

Q. (By Mr. Furry) And State's Exhibit No. 33. A. This is a Kansas license plate which was in the trunk of the black '59 Chevrolet Impala that was there at Burrow's Garage.

Q. That was removed there that morning by you after you gained access to the trunk, is that right? A. Yes.

Mr. Furry: I offer in evidence State's Exhibit No. 33.

Mr. Harrington: Same objection, unless he can connect it up with this defendant in some manner.

The Court: It will be admitted subject to it being connected up.

(State's Exhibit No. 33 was received in evidence.)

Q. (By Mr. Furry) So the jury can get a better idea, this is the photograph of the '59 Chevrolet that you have been talking about? A. Yes, sir.

175 Q. That was in the Burrow's Brothers parking lot out there later on that morning? A. Yes, it was actually in the garage when I examined it, but it was out in the lot when I photographed it.

Q. Where was that print found? A. Back here on the rear deck there just above the lock.

Q. You as a part of your normal duties compare fingerprints? A. No, not for actual identification.

Q. You merely collect and gather the evidence, as I understand it? A. Yes.

Q. Did you then examine the Oldsmobile? A. Yes. There was a green 1952 Oldsmobile there at the garage. I examined it. I examined the outside first, and then I could see in the front seat there from the left side a pile of clothing in about the center of the seat. There was also a brown sack there, brown paper sack. And I opened the door, and then I took a photograph of the clothing as it was there in the center of the front seat.

Q. All right. Now, Trooper Place, I am going to hand you what is State's Exhibit No. 14, which is already in evidence, and ask you to identify that again for us. A. That is the green 1952 Oldsmobile that was there at Burrow's Garage.

Q. All right. Now I show you State's Exhibit 15. A. That is a photograph I made through the left front
176 door there of the green 1952 Oldsmobile.

Q. That was the way it looked there that morning, was it? A. Yes, sir. There was a maroon jacket and four pair of trousers in the seat there.

Q. O.K. A. Then I opened the rear door. There was a coat on the rear seat of the car. There was a belt lying on the floor. The assembly from the dome light was lying on the floor of the car there, the part that holds the light bulb and also the plastic cover that covers the bulb was on the floor. There was a pair of folding binoculars. I believe that is about all in the rear seat of the car there, and I took a photograph of that as it was.

Q. Trooper Place, State's Exhibit No. 17. I will ask you to point out to the jury the objects you previously described. A. Here is the coat, the belt, and there is the light assembly here, and then the binoculars were over here (indicating). Q. All right. Now, this dome light assembly, that was from what portion of the car? A. From the top of the car there.

Q. Inside the car just above the seat—be above the front seat? A. Yes, sir.

Q. All right. Now, after that, what did you do, sir? A. Well, I went around on the other side. I removed the clothing. There was also a gray straw hat there, a
177 dress hat, there was a red bandana and a white—I believe a white scarf. And underneath that back on the seat there, there were two revolvers. One of these was a nickel plated .38 caliber Smith and Wesson, and it was loaded with four cartridges. There was also a black .38 caliber revolver, I believe a Japanese make, and it was loaded with .38 caliber cartridges, five of them.

Q. Now, Trooper Place, I show you State's Exhibit 16, and ask you to identify that—I don't believe that is in evidence yet.

Mr. Harrington: 16?

Mr. Furry: 16.

The Court: It is not in evidence.

Q. (By Mr. Furry) Without showing it to the jury at this time. A. This is a picture taken from the right front door of the car that I took there that morning.

Q. Does it fairly and accurately show the objects that are shown there? A. Yes, sir.

Q. As you saw them there that morning? A. Yes, sir.

Q. All right. That was after, I believe you said, the pile of clothing had been removed, as shown in the other exhibit? A. Yes, sir.

Mr. Furry: All right. I offer into evidence State's Exhibit No. 16.

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178 (State's Exhibit No. 16 was received in evidence.)

Q. (By Mr. Furry) Now that Exhibit 16 is in evidence, show the jury the articles that are in there and what you found. A. Well, this is a black .38 revolver, I believe it is a Japanese make. This is a nickel plated Smith and Wesson revolver. This is a straw hat. And this white scarf, and this was a red bandana handkerchief. This was a paper sack containing a six-pack of beer.

Q. All right. Now I show you State's Exhibits 5 and 6, these two weapons, and ask you to identify them. A. This is the black revolver I found in the seat there. And this is the nickel plated revolver I found in the seat there.

Q. Are they in the same condition today they were at the time you found them? A. Well, they were loaded at that time. Approximately the same condition.

Q. With the exception of the cartridges in each of
179 the two revolvers? A. Yes.

Mr. Furry: I offer in evidence State's Exhibits 5 and 6.

Mr. Harrington: No objection.

(State's Exhibits 5 and 6 were received in evidence.)

Q. (By Mr. Furry) All right, sir. Was there anything else you did in regard to the '52 Oldsmobile? A. Well, I examined it there for fingerprints, but I didn't find any that were of value for identification purposes. Also we opened the trunk of the car and found a large amount of clothing

and personal possessions in the rear trunk of the car there.

Q. Did you determine who those belonged to? A. They belonged to Ray Roberts, the owner of the car.

Q. All right. Now, a moment ago in answer to my question, you said in processing the car for fingerprints that you found no prints of value. Will you tell the jury what that means in your terminology as a police officer? A. Well, you have to have the ridges, you have to have a sufficient number of those ridges so that an actual identification can be made. Sometimes they are smudged or just partial.

Q. That is what you mean when you say you found no other prints of value? A. Yes.

Q. Prints that could not be used in identifying a person as having touched an object? A. Yes, sir.

180 Q. Did you do anything else, sir? A. I believe that is about all as far as the cars go there at Burrows.

Q. You took some of these other photographs in connection with this case, didn't you? A. Yes, sir.

Q. The ones involving Buehler and Ferguson and Dewey Millsap? A. Yes, sir.

Mr. Furry: I believe that is all.

Cross Examination

By Mr. Harrington:

Q. Did you attempt to process the two revolvers or shotgun for fingerprints? A. Yes, I did.

Q. Did you discover any fingerprints at all of any value? A. No, sir.

Q. In other words, the only print you could lift or photograph was this print on the deck of the Impala Chevy? A. I photographed it. I made some other lifts of fingerprints from the Impala, too.

Q. Could they be identified? A. No, sir.

Q. Would they be the owner's prints, or the garage man's prints, or some of the prooper's prints? A. They could be yes.

Q. You didn't check them to find out? A. They were checked. I had a palm print and it was checked

181 against some other people. However, no identification was made.

Mr. Harrington: Thank you, Trooper. That is all.

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182 (Witness excused.)

Herman Davis.

called as a witness on behalf of the State, being duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. Herman B. Davis, 4807 Fairmont, Kansas City, Jackson County, Missouri.

Q. What is your occupation, Mr. Davis? A. I am employed by the Police Department, Kansas City, Missouri assigned to the crime detection laboratory as a supervisor of the laboratory.

Q. Can you tell me who over in the Kansas City Laboratory normally handles fingerprints identifications? A. Yes, sir. That is Leon Hines.

Q. Where is Mr. Hines today? A. He is in Menorah Hospital.

Q. I see. He has been for several days, hasn't he? A. Yes, sir, since Sunday.

(State's Exhibit No. 34 was marked for identification.)

Q. Mr. Davis, let me hand you first of all State's Exhibit 31, which is a negative, and State's Exhibit No. 27, which is a fingerprint card, and ask you if you have
183 ever seen those two items before? A. Yes, sir, I have.

Q. As a matter of fact, I had those delivered to you Monday of this week after we found out about Mr. Hines being in the hospital, is that right? A. Yes, sir.

Q. All right. Now I am going to hand you what is marked State's Exhibit No. 34, and ask you to identify that, sir, if you can. A. State's Exhibit No. 34 is a photographic illustration of an inked fingerprint on the right-hand side and of a latent fingerprint which has been photographically reproduced from the negative of State's Exhibit No. 31.

Q. And the other exhibit, is it reproduced from any other exhibit in this case? A. The inked fingerprint photographic illustration has been reproduced from the fingerprint card which is marked in red State's Exhibit No. 27.

Mr. Furry: All right. At this time I am going to offer in evidence State's Exhibit No. 34.

(Whereupon, the following proceedings were had and entered of record in the presence but out of the hearing of the Jury:)

Mr. Harrington: Here we go again. Now I am going to object to all this admission of the fingerprints of Mr. Johnson.

The Court: Nobody said whose it was yet.

184 Mr. Harrington: Exhibit 27, they are connecting it up here, and they have offered it as Johnson's print, which I objected to because they had not laid the proper foundation. We are not trying Mr. Johnson.

The Court: I am aware of that fact. Mr. Furry, will it be connected up?

Mr. Furry: Yes, our theory is that Johnson and this man were together.

The Court: The exhibit is admitted subject to being shown later on to be connected.

(Whereupon, the following proceedings were had and entered of record in the hearing and presence of the Jury:)

(State's Exhibit No. 34 was received in evidence.)

Q. (By Mr. Furry) Mr. Davis, were you able to make a comparison on these two fingerprints? A. Yes, sir.

Q. Now, if you can, can you step over here so the jury can see this? A. Which one of the two photographs that appear here is the enlargement of State's Exhibit No. 31? A. This one on the left-hand side is the enlargement negative of No. 31.

Q. All right. And the one on the right then would be an enlargement of the fingerprint card? A. This is an enlargement of State's Exhibit No. 27, the index finger and ring finger on the right hand at this point.

Q. Now, will you tell the jury how, when you have 185 a latent print, such as you have on the left of this card, and a fingerprint, how you use the two in making an identification? A. Attention is given to the points where are marked with these red lines which end at a point which would include places where the lines come together and line end, or anything that would occur in this entire pattern which can be marked as a significant point, which can also be found on the fingerprint in question.

Q. All right, sir. What do you call these, for example, point one on the right and point one on the left? A. Point No. 1 is a bifurcation.

Q. Where two lines come together? A. Where two lines come together, which can be found at Point No. 1 on the latent fingerprint. It is a significant thing about this fingerprint which occurs at that point, and which may occur at other points on the other fingers, but on this particular one, it occurs at that point, so far removed from the core of the fingerprint, so many lines, so situated around the core of the fingerprint.

Q. How many points of that type of character do you need to be able to make identification? A. Generally that is considered to be 12 points.

Q. As you have in this— A. As are marked here.

Q. Do you have an opinion, based on your experience and your judgment as to whether or not these two fingerprints are the same? A. Yes, I do.

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Q. What is that? A. My opinion is that these two fingerprint impressions were made by one and the same person.

Q. So that if it were in evidence that the fingerprint card on the right is the fingerprint of John Edward Johnson and that the fingerprint on the left was taken from the top door or the trunk lid of a 1959 Impala car, you would say that the print was made on the back of the car by John Edward Johnson, is that right? A. On the back of the car, on this card, and likewise wherever this was lifted from, yes.

Mr. Furry: Thank you. I believe that is all.

Mr. Harrington: I renew my objection as to the admission of this evidence.

The Court: Overruled.

Mr. Harrington: No questions.

Mr. Furry: That is all.

(Witness excused.)

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187 AFTERNOON SESSION

Arthur Graham.

called as a witness on behalf of the State, being first duly sworn, testified as follows:

Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. Arthur Graham.

Q. Mr. Graham, where do you live? A. Grandview, Missouri.

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Q. On January 10 were you the owner of an automobile? A. Yes.

Q. What kind of car did you have? A. '59 Chevy.

Q. What color was it? A. Black.

Q. What model? A. '59.

Q. Is that the car (indicating)? A. Yes.

Q. All right. Now, Mr. Graham, do you know the defendant Bobby Ashe? A. Yes.

Q. How long have you known him? A. All my life.

Q. Do you know a man by the name of John Edward Johnson? A. Yes.

Q. And Eric Larson? A. Yes.

188 Q. All right. Now, is this defendant related to John Edward Johnson? A. Brother.

Mr. Harrington: I think just his bare knowledge of whether he is related or not is not sufficient to establish any relationship. I object to this line of questioning.

The Court: Overruled. He can testify whether they are kin or not.

Q. (By Mr. Furry) Do you know their relationship? A. Brothers.

Q. Prior to January 10, which was a Sunday, when was the last time you had even seen your car prior to that time, say Sunday morning? A. Saturday.

Q. Saturday afternoon? A. Yes, sir.

Q. That was the day prior, that would be the 9th of January? A. If Sunday was the 10th, it would be the 9th.

Q. Just the day before? A. That is right.

Q. All right. Who at that time had the car? A. John Edward Johnson.

Q. John Edward Johnson? A. Yes

Q. Was anybody with him? A. Eric Larson.

Q. Now, had you prior to that time, I think the day prior, you had been with John Edward Johnson, had you? A. On a Friday night, yes, sir.

Q. And without going into any conversation, what
189 what happened that Friday evening? A. Well, he called me from Harrisonville, his car broke down, and he wanted me to come pick him up.

Q. Did you go to Harrisonville? A. Yes, I did.

Q. When you got to Harrisonville, what did you do? A. He got in my car and I brought him back.

Q. Did you see him the next morning? A. Yes, on Saturday morning, yes.

Q. Was anybody with him at that time? A. Eric.

Q. Eric who? A. Larson.

Q. All right. And then what happened? Without going into any conversations again, just what you did, tell us from that point on. A. I took him back to Harrisonville to sell his car.

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Q. That is John Edward Johnson and Eric Larson was along too, is that correct? A. Yes.

Q. All right. When you got down to Harrisonville, what did you do? A. Well, he sold the car, but he didn't have the title and couldn't get the money.

Q. Now, did he take anything from his car before he sold it? A. After he sold it he took a license plate and spare tire.

Q. License plate and spare tire? A. That is right.
190 Q. What did he do with those two articles? A. Put them in the trunk of my car.

Q. All right, sir. Now, what kind of license plate was it on his car? A. Kansas license plate.

Q. Where did he live? A. Kansas.

Q. I hand you what has been marked State's Exhibit No. 31, and ask you to identify that, if you can. A. Well, I don't know if it is the same license. It is the same color, Kansas license.

Q. You didn't take the numbers down, I take it? A. No.

Q. Did Johnson live in Wyandotte County? A. I don't know.

Q. Then after these articles were removed and placed in the trunk of your car, what did you do then? A. Come back home.

Q. That is up to Grandview? A. Yes.

Q. All right. Then what happened to your car after that? A. He took my car to go get his title, to go back to sell his car.

Q. I see. And was Larson still with him at that time? A. Yes, at that time.

Q. Approximately what time was it the last time you saw the two of them together in your car when they left? A. I would say between two and three o'clock, something like that.

191 Q. Two and three o'clock. That would be in the afternoon? A. On Saturday.

Q. On Saturday. When was the next time you saw your car? A. On Tuesday.

Q. That would be the following Tuesday? A. Yes.

Q. Where was it at that time? A. Lee's Summit.

Q. Where in Lee's Summit? A. Lewis's Garage, I believe, is the name of it. I am not for sure.

Q. Did you at any time from 2:30 Saturday afternoon until the next time that you saw your car see this defendant, or Johnson, or Larson? A. No, sir.

Mr. Furry: I believe that is all.

Cross Examination

By Mr. Harrington:

Q. The two you loaned your car to was Larson and Johnson? A. I loaned it to John Edward.

Q. And Larson was along? A. Yes.

Q. You never saw Bobby Ashe? A. No.

Mr. Harrington: That is all.

Mr. Furry: That is all.

(Witness excused.)

Otto Ray.

called as a witness on behalf of the State, being first duly sworn, testified as follows:

192 Direct Examination

By Mr. Furry:

Q. Will you state your name and address, please? A. Otto Ray, 2410 Harrison.

Q. Your occupation, Mr. Ray? A. Deputy Sheriff, Criminal Division.

Q. That is here in Jackson County, Missouri? A. [illegible], sir.

Q. What is your assignment or your job with the [illegible] Sheriff's office? A. Work in the criminal division on the floors and in the cage.

The Court: Speak out a little louder, please.

Q. (By Mr. Furry) Were you on duty Sunday, January 10 of this year? A. Yes, sir.

Q. Did you see the defendant Bobby Ashe at that time? A. Yes, sir.

Q. And where was that? A. On the 11th floor, county jail.

Q. And what was your duty on that particular day? A. To book them in the jail.

Q. To book people into the jail? A. That is right.

Q. Did you book this defendant into jail? A. I did.

Q. Just tell the Court and jury what you did when
193 he arrived there at the jail. A. I opened the door. They brought the prisoners in. I directed them up to the window for their names and addresses, and when they was through I taken them to the desk, shook them down, took the property and stuff on them.

Q. Is that a normal procedure that is followed for prisoners entering the jail upstairs? A. Yes, sir.

Q. That procedure was followed in this case, is that right? A. Yes, sir.

Q. Now, did you search Bobby Ashe? A. Searched all of them.

Q. Now, referring particularly to Bobby Ashe, what did you find when you searched him? A. Bobby Ashe had $130.

Q. Where was the $130 taken? A. I taken it off his personal property, out of his pockets.

Q. Where? A. Out of his clothes.

Q. Out of his clothes? A. That is right.

Q. What part of his clothes, sir? A. Well, his pockets. And I made him take his shoes off, socks off.

Q. Where was the money? A. In his pocket. He had some in his coat pocket, I think.

Q. Did he have some in his shoe or sock? A. That is a mistake I made. I got it all out of his pocket of
194 his coat.

Q. Didn't you tell me prior to this you took it out of his shoe? A. No, I said I made him take his shoes and socks off. That was a misunderstanding, because I have heard it four or five time.

Q. Do you know where the misunderstanding arose? A. Well, a lawyer has spoken to me concerning that. I said, "No, Bobby is the only one that had any property on him."

Q. That is right. There was no money on any of the others when they were brought to the jail? A. No, sir.

Q. He was the only one that had any money? A. Right.

Q. You say you took this money from his pockets? A. Pockets. Out of his coat pocket and pants pocket.

Q. You say he had a coat on? A. Yes.

Q. He had a coat on? A. He had it on his arm.

Q. Carrying it on his arm? A. Yes.

Q. What color coat was it? A. I disremember that. I couldn't tell you.

Q. Who has talked to you about this, Mr. Ray? A. Nobody.

Q. You said a lawyer talked to you. A. He asked me right in that hall, "Where did you take the money off Bobby?"

Q. Didn't you testify under oath prior to this time—A. I did.

195 Q. That you took the money from his shoe? A. No, that was a misunderstanding somebody made. I did not take it out of his shoe.

Q. Didn't you testify under oath, sir, that you took the money from between his sock and his foot? A. No, sir, I did not. I made him take off his shoes and socks. That is where the misunderstanding came from.

Mr. Furry: That is all, Mr. Ray.

Cross Examination

By Mr. Harrington:

Q. Since you have talked to an attorney—have I talked to you about this case? A. No, sir.

Q. Never approached you about it? A. No, sir.

Q. Do you know the attorney that did talk to you? A. He was down here before. Some lawyer out in the hall asked me about where I took the money from Bobby.

Q. I want it clear to this Court and jury, I have never discussed this with you? A. No, no.

Mr. Harrington: That is all.

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Joseph L. Murphy,

called as a witness on behalf of the State, being first duly sworn, testified as follows:

196 Direct Examination

By Mr. Furry:

Q. State your name and address, please. A. Joseph L. Murphy, 4051 Baltimore.

The Court. Speak up so the jury can hear you, Mr. Murphy.

A. Joseph L. Murphy, 4051 Baltimore, Kansas City, Missouri.

Q. (By Mr. Furry) What is your occupation, Mr. Murphy? A. Chief draftsman in the Jackson County Highway Department.

Q. How long have you been with the Highway Department? A. Fifteen years.

Q. And how long have you been a draftsman, engineer, sir? A. Nearly forty years.

Q. Did you at my request bring a plat covering the area of Unity Farm? A. Yes, I did.

Q. Where did you get that plat, sir? A. From our records, printed drawing in our records.

(State's Exhibit No. 35 was marked for identification.)

Q. Mr. Murphy, I hand you what has been marked State's Exhibit No. 35, and ask you to identify that, please, sir? A. This is Sheet 14 of the road record maps of Jackson County, Missouri.

Q. Are those records kept in the normal and usual course of your business, there? A. Yes, they are.

197 Q. Under whose care, custody and control are they? A. Under my care.

Q. Are those maps revised from time to time? A. Yes.

Q. Is that brought from your current file or current record? A. This is a current map, yes.

Q. Are the lines that are on here drawn to scale? A. Yes.

Q. What is the scale of this map? A. Four inches to the mile.

Mr. Furry: I offer in evidence State's Exhibit No. 35.

Mr. Harrington: Is that a recent map, Mr. Murphy?

The Witness: It is an up-to-date map. There has not been any change of any consequence except the new city limits of Lee's Summit.

Mr. Harrington: Thank you. No objection.

(State's Exhibit No. 35 was received in evidence.)

Q. (By Mr. Furry) Now, Mr. Murphy, that is the map that you have told us about from your records up there in the Highway Department, is that correct? A. Yes, sir.

Q. Now, is Highway 50 shown on that map? A. Yes, sir.

Q. That is running in a generally north and southwestly direction? A. Yes.

198 Q. Is Colborn Road and Bannister Road shown on there? A. Yes. It is called Bannister west of 50 and Colborn east.

Q. Which way is north on that? A. The top.

Q. And Noland Road, would you point that out? A. Right here (indicating).

Q. All right, sir. Now, Mr. Murphy, did you make certain marks on this map that don't normally appear there? A. Yes, I did.

Q. And at my request, was it not? A. Yes.

Q. Now, first of all, this "T" shaped mark in red, will you tell the jury what that is? A. This here?

Q. Yes. A. Unity School of Christianity tower.

Q. All right. Now, sir, this mark which is north of Colborn Road, would you give me the distance from Highway 50 and Colborn Road intersection here to this point? A. Seven-tenths of a mile.

Q. Sir, would you place the No. 19 by that particular mark? A. (Witness complies.)

Mr. Furry: I am attaching State's Exhibit No. 19 to that part of the map adjacent to the figure 19.

Q. Now, this mark which is just to the west of Highway 50, and to the north of the intersection, what is that distance? A. Half a mile, five-tenths of a mile.

199 Mr. Furry: I am attaching State's Exhibit No. 21 near that mark.

Q. Now, this point over here on Noland Road just to the east and adjacent to Noland Road, can you give me the distance from this point down to the intersection of Bannister and Noland? A. Three-tenths of a mile.

Q. All right, sir. Would you by that point place the number 23, please? A. (Witness complies.)

Q. Thank you, sir. I am attaching State's Exhibit No. 23 to the chart. Now, this point from the intersection over to the point just to the east, what is that distance? A. Three-tenths, also.

Q. Three-tenths of a mile? A. Three-tenths of a mile.

Q. Would you please mark 24 by that? A. (Witness complies.)

Mr. Furry: I will attach State's Exhibit No. 24.

Q. Now, this distance right here from the intersection down to this first point heading south on Highway 50 there. A. Four-tenths of a mile.

Q. Would you put the No. 30 by that, please? A. (Witness complies).

Mr. Furry: I attach State's Exhibit No. 30.

Q. Now, the last mark on the map just to the south of No. 30 is another point. Give us that distance from the intersection. A. Six-tenths of a mile.

200 Q. Mark 25 there, please. A. (Witness complies).

Mr. Furry: I am attaching State's Exhibit No. 25.

All right. Thank you, Mr. Murphy.

Mr. Harrington: I have no questions.

(Witness excused.)

Mr. Furry: Your Honor, I would like to take a short recess, if I may.

(RECESS)

Mr. Furry: At this time, Your Honor, I want to re-offer into evidence State's Exhibits 1 through 35, inclusive.

The Court: I think that all of the exhibits have been offered and have been received in evidence; however, let the record show that State's Exhibits 1 through 35 are by the State re-offered and are received in evidence; that those exhibits which were objected to by the defendant, show that the defendant renews his objections, which objections are by the Court overruled.

Mr. Furry: I would like to pass the exhibits to the jury.

The Court: Very well.

Otto Ray,

recalled as a witness on behalf of the State, being previously duly sworn, testified further as follows:

Re Direct Examination

201 By Mr. Furry:

Q. You are Otto Ray? A. That is right.

Q. You were on the stand here a few minutes ago? A. I were.

Q. Were you under oath at that time? A I were.

Q. And did you not at that time testify that you searched the defendant Bobby Ashe on January 10 of this year? A. I searched him on the day he came in.

Q. Whatever day that was? A. Whatever day that was.

Q. He came to the county jail and you searched him? A. That is right.

Q. That was on a Sunday? A. That is right.

Q. And at that time you testified previously this afternoon that you took certain property from the defendant, is that right? A. I testified I taken money off of him.

(Whereupon, the following proceedings were had and entered of record in the presence but out of the hearing of the Jury:)

Mr. Harrington: For the record I want to object to this line of questioning, because he is attempting to impeach his own witness, and he has not shown the man to be hostile. He is a police officer. This is the State's own witness they are attempting to impeach and that is objectionable.

Mr. Furry: This is the reason for this examina-
202 tion. At the time I made my opening statement I told the jury the evidence would be when this man

searched the defendant he had the sum of $130.00 between his foot and sock. This man has got on the stand and testified under oath that he did not, which was a surprise to the prosecuting attorney. I also believe that the evidence will show that this man has under oath on prior occasions testified contrary to this and I wish he be declared a hostile witness. I expect to show this.

Mr. Harrington: He has not shown any hostility. He said there had been a misunderstanding.

Mr. Furry: I am not going to take this witness's word for it. When he says it is a misunderstanding when he testifies to material facts contrary in two different lawsuits, I think the State is greatly prejudiced by not being allowed to cross examine this witness.

Mr. Harrington: He is attempting to impeach his own witness, Your Honor.

The Court: We will take a short recess. The jury will be taken upstairs.

(RECESS)

(Whereupon, the following proceedings were had and entered of record in chambers out of the hearing and presence of the Jury:)

The Court: The State has recalled a witness, Otto
203 Ray, a deputy sheriff of Jackson County. This witness testified today in this case that he was on the desk of the Jackson County jail at the time the defendant was admitted, and in the course of his official duties searched the person of the defendant for his possessions, and testified that he got $130.00 out of his pockets, both trousers and the coat the defendant was carrying on his arm. The prosecuting attorney in his opening statement to the jury told the jury that he would show that the $130.00 found on the defendant's person at the time he was admitted to the jail was found in his shoe. The witness Ray has previously testified in the trial of State of Missouri versus Eric Lafe Larson, a co-defendant, that the $130.00 was found concealed in his shoe between his foot and his sock. The state is claiming surprise and has requested to be permitted to cross examine this witness as to his prior testimony with reference to this matter.

The Court is of the opinion that under the authority of State vs. Rack, 318 S.W. 2d, 211, the State may be permitted to cross examine this witness Ray upon the question as to where the money was on the person of the defendant. That the cross examination of this witness will be limited solely to that matter.

Mr. Harrington: To which the defendant duly excepts and objects on the ground that the prosecuting attorney is attempting to impeach his own witness.

204 Your Honor, I have been advised by the State that their case is practically completed, and at this time in chambers and out of the presence of the jury, I desire to inform the Court that the only evidence that I purpose to show or introduce on behalf of the defendant is this. I have subpoenaed the clerk of the Criminal Court of Jackson County, Missouri, as a witness to bring in the official records of the criminal court of Jackson County, Missouri, to show that John Edward Johnson and Eric Lafe Larson have heretofore been tried in the criminal court of Jackson County, Missouri, for their participation in the robbery, which is the subject matter of this case, have been convicted by a jury. That Thomas Eugene Brown, another defendant, entered a plea of guilty during the course of his trial for his participation in the poker game robbery. It is my position that there having been testimony in this case that only three people were involved in the hold-up, that it is proper for me to show that three people have been either convicted or plead guilty.

The Court: Mr. Harrington, you will not be permitted to introduce the evidence of the convictions of the other co-defendants, or the plea of guilty by one defendant. I have examined the cases, Missouri Digest under Criminal Law, Key 422, and I am of the opinion that such evidence is not proper, and therefore you will not be

205 permitted to introduce it.

Can we have the agreement when the State completes its case that this record may be taken as a re-offering of the matters and that you make your offer at that time, and I am ruling adversely to it?

Mr. Harrington: And I object to your ruling.

(Whereupon, the following proceedings had and entered of record in the presence and hearing of the Jury:)

Otto Ray,

resumes the stand and testifies further as follows:

Re Direct Examination
(Continued)

By Mr. Furry:

Q. Mr. Ray, since we have had this recess, I would like to go back over your testimony earlier this afternoon when I called you as a witness in this case on behalf of the State. You testified that on the day the defendant was brought into the county jail that you searched him and frisked him, I believe? A. Right.

Q. And that at the time you searched him you found the sum of $130.00 on his person, is that right? A. Right.

Q. And you say that you found part of that money in his coat which he was carrying at that time? A. Coat or shirt, one of the two. I don't remember what he had on. I know it was in his clothes, whatever he had on. I
206 don't even remember what he had on.

Q. Didn't you testify, sir, earlier today that he had a coat in his arm? A. I said I taken it out of his coat or his pants. It could have been his shirt.

Q. But you did say he had a coat? A. Yes, I said I taken it out of his coat. That is what I said.

Q. Or his pants? A. And his pants.

Q. And his pants? A. Yes.

Q. Part of the money was taken from his coat and part from his pants, is that right? A. Coat or shirt, and the pants. Now I don't remember what he had on even.

Q. But he was carrying some garment, I take it? A. Yes. Had it on his arm.

Q. All right. And at that time when you were under oath, just as you are now— A. Right.

Q. —you stated in response to one of my questions that he did not have any money in his shoe or in his sock? A. I didn't taken any out, I didn't find any in his shoe or his sock.

Q. You were there when he took his shoes and socks off? A. I am the one that took them off.

Q. You took them off of him? A. That is right.

Q. Your testimony is here today that he did not
207 have any money in either his shoe or his sock, is that right? A. That is right.

Q. Mr. Ray, isn't it a fact that you have told me prior to this time when I have discussed this case with you that he had money in his sock? A. No, sir. That was a misunderstanding some place, because he did not have any in his shoe or his sock. I taken them off. I made the remark that I searched him, taken $130.00 off of him, and I made him take his shoes and socks off and searched him all the way down.

Q. Then you deny under oath here today that you ever made the statement to me at any time that this defendant Bobby Ashe had the sum of $130.00 in either his shoe or his sock? A. I never did say that.

Q. You never did say that? A. I don't remember saying that, because I didn't take it out of his shoe and sock.

Q. I am not asking you where you took it from now, sir. We have gone through that. I want to know whether or not you made that statement to me. A. I don't remember me making any statement to anyone.

Q. You don't remember, or you didn't do it? A. I want an answer. A. I said I didn't take it out of his shoe or sock.

Q. I want an answer to this question, sir. Did you ever make a statement to me that you took the sum of
208 $130.00 from this man's shoe or sock? A. Not to my memory.

Q. Your answer is no? A. That is what I said.

Q. All right. Do you remember testifying in the case of State of Missouri versus Eric Lafe Larson on the 17th day of May, of this year? A. I do.

Q. In this courtroom? A. I do.

Q. At that time you were sitting in that very witness chair there? A. Yes, sir.

Q. At that time you were under oath, were you not? A. I were.

Q. Let me ask you if you were not asked these questions and if you did not give these answers: "Question: Would you state your name and address, please, sir? A. Answer: Otto Ray, 2410 Harrison." A. That is right.

Q. "Question: What is your occupation? Answer: Deputy Sheriff, Criminal Division." A. That is right.

Q. And I was asking you those questions, wasn't I? A. Most sure you did.

Q. "Question: That is here in Jackson County, Missouri? Answer: Jackson County, Missouri. Question: What is your duty for the Sheriff's office? Answer: Well, I handle prisoners when they come in and going out." Were you asked those questions and did you give those answers? A. Well, I don't have nothing to do with them going out.

209 Q. Were you asked that question and did you give that answer? A. I don't remember me saying that I had anything to do with them going out.

Q. Are you denying you made that statement? A. I have got to because I have nothing to do with them going out.

Q. All right, sir. Then were you asked this question: "What do you do—what do you have to do with them as they come in? Answer: We have to go through a routine searching them, see that they are dressed in properly before they go on the floors." A. That is right. When I am on that shift.

Q. Were you asked that question and did you give that answer? A. I gave that answer concerning the Sunday I were there.

Q. All right. "Question: Were you on duty on Sunday, January 10 of this year? A. I was, sir." A. I were.

Q. "Question: Did you have occasion to check in a man by the name of Bobby Ashe? Answer: Yes, sir." A. That is right.

Q. "Question: And where was that? Answer: That was on the eleventh floor. Question: Of this courthouse right here? Answer: Yes." Yere you asked those questions and did you give those answers? A. Jackson County Courthouse.

Q. "Question: Just tell us what you did when you
210 checked Mr. Ashe in? Answer: I go through the procedure the same as all prisoners, have them put all their property on the desk; when I think they have not put it all on there, I stand them up against the wall and frisk them all the way down and make them take their shoes off." A. That is right.

Q. "Question: Did you do this with Mr. Ashe? Answer: All of them. Question: Did you find some property on Mr. Ashe? Answer: Some, yes." A. That is correct.

Q. Were you asked this question: "What did you find?

Answer: Found some money on him, $130.00." A. That is right.

Q. You were asked that question and gave that answer at that time? A. Yes, sir.

Q. That is when you were under oath in the Larson case? A. That is right.

Q. The next question: "Question: Where did you find this money? Answer: In his shoe, in his sock." Were you asked that question and did you give that answer? A. I don't remember making any answer to that effect because I didn't do it.

Q. Let me ask you this question again, sir. I want a yes or no answer. A. Go ahead.

Q. Were you asked this question: "Where did you find this money? Answer: In his shoe, in his sock."
211 Were you asked that question and did you give that answer? A. I don't remember giving no answer I found it in his shoe and his sock.

Q. Are you saying you didn't give that answer? A. No, sir, because I didn't get it out of his sock.

The Court: The question, Mr. Ray, is whether that question was asked and if that answer was given. That is the only thing you are being asked now. Can you get that in your head?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Furry) Mr. Ray, I will ask you one more time. A. Go ahead.

Q. "Where did you find this money?" That was the question that I asked you, and did you give this answer under oath: "Answer"—and I am quoting—"In his shoe, in his sock." A. I didn't find it in his shoe and sock.

Q. I didn't ask you where you found it. I asked you if you gave that answer? A. If I gave that answer in response of your question I gave a wrong answer because I didn't find it in his shoe and sock.

Q. You are not denying you gave the answer? A. I am not denying I said it, but if I did it was not the correct answer, because I didn't find it in his shoe and his sock.
212 Q. You didn't say that? A. I am not denying the words you are saying there, but I did not find it there.

Q. Those are not my words. A. I say you asked me that.

Q. Did you give that answer? A. If I gave it it was not the correct answer.

The Court: Mr. Ray, please listen to the question he asks. Was that question asked you and did you give that answer?

The Witness: I don't remember that question being asked me and me giving that answer to it because I didn't find it—

Q. (By Mr. Furry) You are under oath. A. I know it.

Q. You are testifying in a criminal case, aren't you? A. Yes.

Q. You understand all that? A. Yes.

Q. Before this jury, before this Court? A. That is right.

Q. You remember what happened up there, don't you? A. Yes, I remember.

Q. And you remember testifying down here? A. Yes, I remember testifying.

Q. It was less than a month ago? A. That is right.

213 Q. Did you make this answer in response to the question we have gone over several times: "Answer: In his shoe, in his sock." Yes or no? Did you make the answer? A. I must have made the answer. You say I made it. You have it down in black and white.

Q. I know what I say. I want to know what you say. Did you make the answer? A. If I made the answer it was not correct.

Q. Did you make the answer, sir? A. I must have made the answer. You got it down in black and white. I said it was not correct.

Q. Now your testimony is that you did make that answer, is that correct? A. If you asked me that and you have it down in black and white, I must have made the answer.

Q. I am asking you what you said, sir, not what is down in black and white. A. You asked me the question if I found it in Bobby Ashe's sock and shoe, and that is the answer you want.

Q. I want the truth. A. That is what I am trying to tell you.

Q. All right. You tell me the truth. Did you make that answer? A. If I made the answer it is wrong.

The Court: Did you make the answer or did you not. That is the only question being asked you.

214 The Witness: If I made the answer I found the money in Bobby Ashe's shoe?

The Court: Yes, sir. Did you make that answer?

The Witness: I don't remember making it, Judge, no.

Q. (By Mr. Furry) All right. Let me ask you this question. I then asked you this question. "Just tell the Court and jury where in his sock or shoe you found the money?" And did you give this answer: "Answer: Well, the money was between his bare feet and the sock in his shoe, flat in the bottom of his shoe." Weren't you asked that question and didn't you give that answer? A. If I did it was not correct.

Q. Now, listen. I want an answer out of you and I am entitled to one, and you are going to give me one. A. I am trying.

Q. I want to know whether or not you testified that way on May 20? A. If I testified to that I testified. You got it down in black and white. It must be the answer I gave you, but it was wrong, because I didn't take any money from him out of his shoe.

Q. And at the time you testified you didn't testify anything about a coat in his hand or shirt in his hand, did you? A. You didn't ask me that.

Q. You didn't say anything about finding money in his shirt? A. I said in his shirt or coat because I took

215 it out of one of the two things he had on his arm, and he had some in his pocket, and whatever it was, shirt or coat, he had on his arm. I searched them all.

Q. Are you testifying that in the other trial when you came down here under oath you said the man had a shirt over his arm? A. It was a shirt or coat.

Q. Did you testify to that in the other trial? A. I must have testified to that but I don't know whether it was a shirt or coat.

Q. I am not asking you what it was. Did you testify to that? A. I said I testified about it. I don't know whether it was a shirt or coat because I didn't pay no attention to what kind of clothes he had on.

Q. In the other trial did you testify he had money in his trousers? A. I said I took it out of his trousers, yes, sir.

Q. Then you deny that you said that you found the money in his shoe or his sock, is that correct? A. I certainly do, because I didn't find it there.

Q. I am not asking you where you found it. I am asking you that at the other trial you did not testify, did you, sir, that you found the money in any coat or in his shirt or in his trousers, is that correct? A. That is right.

Q. You did not testify that way, did you? A. No, sir.

216 Q. You testified you found it in his shoe and in his sock, didn't you? A. If I testified it was wrong because I don't remember ever finding anything out of Bobby's shoe or sock.

Q. We have had a lot of wrong answers. That is all right. A. And I am the man that searched him.

Q. Were you telling the truth in front of the other jury or in front of this jury? A. I am telling the truth in both.

Q. Although in one place you testified it was in his shoe and sock and now today you come in and suddenly say you found the money in his pants and coat, is that right? A. It was in his shirt or coat, one of the two. He had it on his arm, and his pants.

Q. How many people have talked to you about this since the time you testified? A. No one.

Q. Nobody? A. Nobody.

Q. No one at all? A. No one at all. Only time anybody asked me was right out in that hall, the first time you had me down here to testify. One of the lawyers. I don't know which lawyer it was.

Mr. Harrington: It was not this lawyer?

The Witness: No, it was not you. Nobdy talked to me on the case.

Q. (By Mr. Furry) Why is it that you have
217 changed your testimony? A. If I changed my testimony—I don't want to lie on nobody's affairs during any time, and I did not take no money off Bobby Ashe's shoes or socks.

Q. Then why did you come into court under oath in the other case of State of Missouri versus Larson and testify you did? A. I must not have understood you correctly when you asked me the question.

Q. You understood most of the other questions I asked you? A. I did.

Q. Your hearing is good, isn't it? A. Yes.

Q. You hear good? A. It is pretty good.

Q. You understand English? A. I certainly do.

Q. You haven't any difficulty understanding the questions today? A. No.

Q. "Where did you find this money?" Do you find anything difficult about that question? A. It does, because I didn't take it—

Q. I say, does the question puzzle you? Is there something unique about the question? "Where did you find this money?" A. No. It doesn't puzzle me.

Q. It is a simple question? A. Yes, it is simple.

Q. Didn't you say "In his shoe, in his sock"? A. If I did I don't remember making no statement such as that, because I know it was wrong.

Q. Didn't you make the other answer—these
218 were your own words, not mine, not anybody else's—"Well, the money was between his bare feet and the sock in his shoe, flat in the bottom of his shoe." A. If I made it I don't remember making that, because I didn't take it from there.

Q. But you could have made the statement? A. I could have made the statement.

Q. You don't remember making the statement? A. No.

Q. But you are not denying you made it? A. I am not denying it.

Q. You could have made the statement? A. I could have.

Q. In the other trial. A. The other time. I work 16 hours and they pull me down here and I am restless and tired. Same thing today.

Q. We are all a little tired, Mr. Ray. A. No, I don't think all of you work 16 hours straight through and come down here and jump right back on it, and I am not no young man.

Q. I don't want to jump on anybody. I just want you to explain to this Court and jury why you are testifying different today than you did on May 20 of this year?

The Court: I think we have gone far enough.

Mr. Furry: All right. The man is tired. He wants to go to bed.

219 The Court: All right. That is all.

(Witness excused.)

Mr. Furry: State rests, Your Honor.

STATE RESTS

(Whereupon, the defendant filed his Motion for Judgment of Acquittal at the Close of the State's Case, which motion, omitting caption and signatures, is in words and figures as follows, to wit:)

"MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE

COMES Now the defendant, Bob Fred Ashe, and at the close of the State's case, moves for judgment of acquittal for the following reasons:

1. That the evidence is legally insufficient to sustain the charge.

2. That under the evidence the state has failed to carry the required burden of proof as a matter of law.

3. That under the law and the evidence as adduced in the state's case, the circumstances connecting the defendant with the crime are so conflicting as to be inconsistent with the hypothesis of the defendant's guilt of said crime as a matter of law.

4. Because the state has produced no substantial, probative evidence that the defendant committed the crime, the state has failed to make a submissible case.

5. Because there is not sufficient credible evidence
220 to sustain the essential elements of the crime charged as to this defendant, the defendant is entitled to a judgment of acquittal as a matter of law."

(Which said Motion for Judgment of Acquittal was by the Court overruled.)

(Whereupon, the following proceedings were had and entered of record in the presence but out of the hearing of the Jury:)

Mr. Harrington: For the record I make my offer of proof in the order that we have already made in the chambers.

The Court: In other words, you are advising me you wish to introduce and show the convictions and plea of the three other persons charged with this robbery?

Mr. Harrington: Since there were only three, yes.

The Court: I have already indicated in my opinion that such evidence is not competent. Let the record show that the defendant has made an offer of proof, the State objects to it, and the Court has sustained the objection.

(Whereupon, the following proceedings were had and entered of record in the presence and hearing of the Jury:)

The Court: Do you have any testimony?
Mr. Harrington: No. The defendant rests.

DEFENDANT RESTS

EVIDENCE CLOSED

The Court: Gentlemen, the testimony in this case has been concluded, I am advised. We will take a short recess.

221 (Whereupon, the following proceedings were had and entered of record in chambers out of the hearing and presence of the Jury:)

(State's Exhibit No. 36 was marked for identification.)

The Court: The Court is giving instructions numbers 1, 2, 3, 4, 5, 6 and 7. Instruction No. 2 being given at the request of the defendant.
Mr. Harrington: Defendant objects to Instructions 1, 3, 4, 5, 6 and 7 as not stating the law of the case.
The Court: The Court is refusing Instruction No. A offered by the defendant.
Mr. Harrington: The defendant objects to the refusing of instruction No. A.

(Which said Instruction No. A is as follows:)

"INSTRUCTION No. A

The Court instructs the jury that "circumstantial evidence" is proof of certain facts and circumstances in a certain case from which the jury may infer other and connected facts which usually and reasonably follow according to the common experience of mankind. In that connection you are instructed that mere suspicion, however strong, does not supply the place of evidence, and any circumstantial evidence which, when fully considered, does no more than coincide with or render probable the charge sought to be established, such evidence is insufficient to

justify a conviction, and unless all the facts and cir-
222 cumstances proved are consistent with each other and with the guilt of the defendant and inconsistent to a moral certainty with the defendant's innocence, then under the law you would not be justified in convicting the defendant, but rather you must acquit him."

(WHEREUPON, the following proceedings were had and entered in the presence and hearing of the jury:)

(The following instructions were read to the jury:)

INSTRUCTION No. 1

The Court instructs the jury that if you believe and find from the evidence in this case, beyond a reasonable doubt, that at the County of Jackson and State of Missouri, on the 10th day of January, 1960, the defendant herein, Bob Fred Ashe, alias Bobby Fred Ashe, either alone or knowing acting in concert with others, did feloniously make an assault upon one Ray Roberts, with a dangerous and deadly weapon, to wit: revolvers, loaded with gunpowder and leaden balls, and took and carried away any money and property from his person, or in his presence and against his will, by force and violence to his person, or by putting him in fear of some immediate injury to his person, with felonious intent to convert the same to his own use, without any honest claim to said money and property, and with intent to permanently deprive the said Ray Roberts of his ownership, and without the consent of the said Ray Roberts, if such be your finding, then you will find the defendant guilty of Robbery, First Degree and so find in your verdict.

223 And, unless you find the facts to be as above stated, you are instructed to acquit the defendant of Robbery, First Degree.

"Feloniously" means wickedly and against the admonition of the law, that is, unlawfully.

INSTRUCTION No. 2

The Court instructs the jury that the Information in this case is a mere formal accusation and does not, of itself, constitute any evidence of guilty.

INSTRUCTION No. 3

The Court instructs the jury that all persons are equally guilty who act together with a common intent in the commission of a crime, and a crime so committed by two or more persons jointly is the act of all and of each one so acting.

The Court instructs the jury that when two or more persons knowingly act together in the commission of an unlawful act or purpose, then whatever either does in furtherance of such unlawful act or purpose is in law the act and deed of each of such persons.

INSTRUCTION No. 4

The Court instructs the jury that the intent with which an act is done may be proved by direct and positive evidence, or it may be inferred from all the facts and circumstances surrounding and attending the act and must be determined by the jury from the evidence given in the case.

224 INSTRUCTION No. 5

The Court instructs the jury that the law presumes the innocence and not the guilt of the defendant, and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence is the case, when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt, as defined in these instructions.

The Court instructs the jury that if they have a reasonable doubt of defendant's guilt, they should acquit, but a doubt to authorize an acquittal on that ground ought to be a substantial doubt touching defendant's guilt and not a mere possibility of defendant's innocence.

INSTRUCTION No. 6

The jury are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony.

In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest

of the witness, if any, in the result of the trial, the motives actuating the witness in testifying, the witness' relation to, or feelings for or against the defendant, or the alleged injured party, the probability or improbability of the
225 witness' statements, the opportunity the witness had to observe and to be informed as to the matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit and the testimony of each witness such value and weight as you deem proper.

INSTRUCTION No. 7

Form of Verdict

If the jury find the defendant, Bob Fred Ashe, alias Bobby Fred Ashe, guilty of Robbery, First Degree, you may use the following form:

We, the Jury, find the defendant, Bob Fred Ashe, alias Bobby Fred Ashe, guilty of Robbery, First Degree.

.....
Foreman

If the jury find the defendant, Bob Fred Ashe, alias Bobby Fred Ashe, not guilty of Robbery, First Degree, you may use the following form:

We, the Jury, find the defendant, Bob Fred Ashe, alias Bobby Fred Ashe, not guilty of Robbery, First Degree.

.....
Foreman

Your verdict must be unanimous, must be signed by one of your number as Foreman and should be written upon a separate sheet of paper and not upon one of these instructions.

226 (Whereupon, counsel for the State and counsel for the defendant made their closing arguments to the jury).

After hearing all the evidence, the reading of the instructions of the Court, arguments of counsel for their respective parties, said jury retired to the jury room to deliberate in the custody of John Robinson, Deputy Sheriff, who was duly sworn according to law to take charge of the same, to consider their verdict, and after due deliberation, said jury returns into open court with the following verdict, in words and figures as follows, to wit:

"We, the jury, find the defendant Bob Fred Ashe, alias Bobby Fred Ashe, guilty of Robbery, First Degree.

(Signed) ARTHUR HOPPS
Jury Foreman."

June 24, 1960.

Now on this day it is ordered by the Court that said defendant Bobby Fred Ashe be given thirty (30) days in which to file a Motion for a New Trial.

* * * * * * * * * *

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"Motion for a New Trial—Filed July 18, 1960

COMES Now the above named defendant, Bob Fred Ashe, and moves and prays the court to set aside the verdict of the jury returned herein and grant him a new trial for the following reasons:

1. Because the court erred in overruling defendant's Motion to Dismiss Autrefois Acquit which was filed and argued after the jury had been impaneled and sworn. A copy of said Motion to Dismiss Autrefois Acquit is attached hereto and made a part of this Motion for New Trial.

2. Because the court erred in the Memorandum Opinion written by the court in overruling the Motion Autrefois Acquit to which the defendant excepted, objected, a copy of which is attached hereto and made a part of this Motion for a New Trial, in that the Memorandum Opinion as handed down by the court does not state the law in this case.

3. The court erred in refusing defendant's Instruction on circumstantial evidence, a copy of which is attached hereto and made a part of this Motion for New Trial, in that the alleged bandits in this crime were all masked and all identification of defendant was purely circumstantial.

4. Because the court erred in overruling defendant's Motion For a Judgment of Acquittal At the Close of the State's Case in that all the evidence in the case was that three (3) men perpetrated the robbery at the Gladson home and that three (3) men have already been convicted of this crime, namely, Eric Leif Larson, John Edward Johnson and Tom Brown, a copy of said Motion for Judgment of Acquittal at the Close of the State's Case is attached hereto and made a part of this Motion for New Trial.

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5. Because the court erred in admitting, over objection of this defendant, illegal, immaterial, incompetent, irrelevant, prejudicial and highly improper evidence offered by the State, said evidence being Exhibits 19, 20, 21 and 22, which were pictures of various scenes in the vicinity orf said robbery taken at a much later date than that of the robbery and showing in the pictures Highway Patrolmen; Exhibit 27, which were the fingerprints of John Edward Johnson, who had previously been convicted of this crime, which were offered only to prejudice this jury in that John Edward Johnson is the half brother of Bobby Fred Ashe; Exhibit 29, which was a blue shirt found later on the day of the robbery and at a place far removed from the robbery, and Exhibit 30, a photograph of the location where the shirt was found, in that there was no showing by the State of any connection of Exhibits 29 and 30 with this defendant.

6. That the court erred in giving all the Instructions offered by the State, in that said Instructions did not state the law of this case as adduced by said evidence in this case.

7. Because the verdict of the jury is not a fair reflection of the judgment of the tryers of the facts but is a result of bias, passion and prejudice and is a denial of the constitutional guarantee that the defendant shall have a trial by a fair and impartial jury.

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WHEREFORE, defendant prays the court for a new trial for the reasons aforesaid."

(Said documents mentioned in Motion for New Trial have heretofore been set out in this transcript.)

October 10, 1960.

Now on this day comes the Prosecuting Attorney, comes also the defendant, Bobby Fred Ashe, in person and by attorney, Joseph Harrington, and said defendant having been convicted by a jury to the charge of Robbery, First Degree, under the Habitual Criminal Act, and said defendant's Motion for a New Trial, heretofore filed herein, is by the Court taken up, fully heard and considered and by the Court overruled.

Now the Court having fixed the punishment of said defendant at Thirty-five (35) years in the penitentiary of the State of Missouri.

Now said defendant being informed by the Court of the verdict of the jury, finding him guilty of Robbery, First Degree, under the Habitual Criminal Act, and the Court fixing the punishment at confinement in the penitentiary of the State of Missouri for and during the period of Thirty-five (35) years and said defendant being asked by the Court if he has any legal cause to show why sentence should not be pronounced against him in accord-
230 ance with said verdict, and said defendant having nothing further to say and showing no legal cause why sentence should not be pronounced and judgment rendered against him according to the law upon the verdict of the jury, heretofore had herein.

Wherefore, it is ordered and adjudged by the Court that said defendant, Bobby Fred Ashe, do undergo confinement in the penitentiary of the State of Missouri for and during the period of Thirty-five (35) years for said offense of Robbery, First Degree, under the Habitual Criminal Act; and that the State of Missouri do have and recover from defendant all costs herein, and that execution issue therefor, and it is further ordered by the Court that said defendant be remanded to the custody of the Sheriff of Jackson County, Missouri, and that said Sheriff, without delay, remove and safely convey the said defendant to the said penitentiary, there to be kept, confined and treated in the manner directed by law, and the Warden of said penitentiary is required to receive and safely keep him, the said defendant in the penitentiary aforesaid, until the judgment and sentence of the Court herein be com-

plied with, or until the said defendant shall be otherwise discharged by due course of law.

Now the Court sets appeal bond in the sum of Fifty Thousand ($50,000.00) Dollars.

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231 **Notice of Appeal to the Supreme Court of Missouri—Filed October 17, 1960**

Notice is hereby given that Bob Fred Ashe, alias Bobby Fred Ashe, defendant above named, hereby appeals to the Supreme Court from the judgment and sentence of 35 years entered in this action on the 11th day of October, 1960."

October 31, 1960.

Now on this day the Mandate of the Supreme Court of Missouri fixing the bond in the sum of Thirty-five Thousand ($35,000.00) Dollars is filed herein.

January 11, 1961.

For good cause shown it is hereby ordered that the time for filing the Transcript of the Record on Appeal in the Supreme Court of Missouri in this cause is hereby extended to on or before the 15th day of April, 1961.

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE
SEPTEMBER SESSION, 1961

No. 48 539

STATE OF MISSOURI, *Respondent,*

vs.

BOB FRED ASHE, Alias BOBBY FRED ASHE, *Appellant.*

Appeal From the Circuit Court of Jackson County

Hon. J. Marcus Kirtley, Judge

Opinion—Filed November 13, 1961

On June 22, 1960, appellant Bob Fred Ashe was convicted of robbery in the first degree. The information, in addition to the charge of robbery, alleged that Ashe

had previously been convicted of crimes and had served prison sentences therefor. Ashe was sentenced to serve thirty-five years in the State Penitentiary. An appeal was taken to this court.

The only point briefed on this appeal is that the trial court erred in not sustaining a motion to dismiss the present charge. The ground of the motion was that Ashe had previously been tried for this same offense and had been acquitted by a jury.

The evidence introduced by the State supports the following statement of facts: In the early morning hours of January 10, 1960, the defendant Ashe, in company with Eric Larson, Thomas Brown, and John Edward Johnson, entered the home of one John Gladson in Lee's Summit, Jackson County, Missouri. Present in the home at the time were Mrs. Gladson, who was in her bedroom, her husband, John Gladson, Don Knight, Jerry Freeman, Orville Goodwin, Richard McClendon, and Ray Roberts. The men were in the basement of the home playing poker. There was a substantial sum of money on the table where the game was in progress. Defendant and his companions entered the basement. The men playing poker were ordered to remove their trousers. One shotgun and at least two pistols were used to persuade the poker players to obey the orders. Defendant and his companions took the money from the table and also took from the persons of the players money, rings, watches, and other valuables. The above is a brief narrative of what occurred. For a more detailed statement, see State v. Johnson, 347 S.W.(2d) 220. In that case, a conviction of Johnson on a charge of robbery in the first degree was affirmed. Johnson was charged with having robbed Don Knight.

The defendant Ashe was also charged with having robbed Don Knight. On May 3, 1960, a trial on this charge resulted in a verdict of not guilty. The defendant Ashe introduced in evidence the record of that case in support of his plea of double jeopardy. It is contended that only one robbery was committed and having been acquitted, defendant cannot be legally tried again. In the case now before us, Ashe was charged with having robbed Ray Roberts. It was proven by the State that a ring valued at $1,500, a watch valued at $85, and some cash were taken from the person of Roberts.

The question is, may the State in the circumstances as related above file a separate charge against the defendant as to each person who was robbed on the theory that defendant was guilty of more than one robbery? Or was there but one offense and therefore a conviction or acquittal on one charge is a bar to any further prosecutions?

We have read numerous cases on the subject as well as law review articles and sections in Corpus Juris Secundem and American Jurisprudence. Among the cases examined are State v. Williams, Mo., 263 S.W. 195; State v. Varner, Mo., 329 S.W.(2d) 623; State v. Hoag, Sup. Ct. of New Jersey, 122 A.(2d) 628 (same case in 114 A.(2d) 573 (Super. Ct.), 356 U.S. 464, 2 L. Ed. (2d) 913); People v. Kelly, Calif., 335 P. (2d) 955; People v. Lagomarsino, Calif., 217 P. (2d) 124; Orcutt v. State, Okla., 2 P. (2d) 912; Ketton v. Commonwealth, 92 Ky. 522, 18 S.W. 359; In Re Allison, 13 Colo. 525, 22 P. 820. Of special interest are the following law review articles and sections of C.J.S. and Am. Jur.: 24 Mo. Law Review (Nov. 1959) p. 513; 25 Mo. Law Review (Nov. 1960) p. 369; 42 C.J.S. 1123, Sec. 168; 22 C.J.S. 785, Sec. 298; 22 C.J.S. 746, Sec. 285; 22 C.J.S. 614, Sec. 238; 15 Am. Jur. 65, Sec. 390.

Our examination of the law has convinced us that an overwhelming weight of authority supports the rule as stated in 22 C.J.S. 788, Sec. 298d: "*Robbery.* Where accused robbed two or more persons at the same time a prosecution for one of such robberies does not prevent a subsequent prosecution for another." In 15 Am. Jur. 65, 66, Sec. 390, it is stated that "* * * where several persons are robbed at the same time, the offender may be indicted and convicted for the robbery of each person as a distinct offense."

It is urged that in the case where Ashe was acquitted the same issues were tried as in the present case wherein Ashe was convicted. It is true that in each case much of the evidence was of necessity the same. However, the ultimate and main issue in the first case was, did Ashe rob Don Knight? A jury by its verdict found that he did not. In the case now before us, the vital issue was, did Ashe rob Ray Roberts? A jury by its verdict found in the affirmative. Are those verdicts inconsistent? Not necessarily so. In the trial where Knight was the person al-

leged to have been robbed, the jury may not have believed beyond a reasonable doubt that any property was taken from Knight. In the case now before us, the jury found that property was taken from Roberts. It must not be overlooked that it is the function of a jury to weigh the evidence in a criminal case. A verdict of guilty is not authorized unless a jury finds beyond a reasonable doubt that the defendant is guilty. Courts and text writers should not become too excited over the outcome of cases where under apparently similar circumstances one person is convicted and another is acquitted. So long as we have the jury system (and who would want to make a change) we shall have results which at times are puzzling. The same may be true of results in court-tried cases.

The doctrine of "Collateral Estoppel" has been urged as a remedy to prevent multiple prosecutions in cases such as the one now before us. The doctrine was discussed at length, in 24 Mo. Law Review, commencing at page 513, and in 25 Mo. Law Review, page 369. The doctrine has some support as may be noted in the articles in the Missouri Law Reviews. It was given consideration in the dissenting opinions in the Supreme Court of New Jersey and in the United States Supreme Court in the case of State v. Hoag, supra. Those in favor of the doctrine evidently are of the opinion that its application is necessary for the protection of defendants, that is, to prevent the State from harassing an accused by multiple trials. When consideration is given to this subject, it must be kept in mind that the local authorities, the prosecutor and the trial judge, are in a better position to judge the case than textbook writers or appellate courts. Those officers are sworn to uphold the law. Consideration must be given to the rights of an accused. But the rights of the general public and the persons injured as a result of criminal deeds must also be given consideration. The Superior Court of New Jersey in State v. Hoag, supra, 114 A. (2d) 573, l.c. 577 (8) made a statement which we think should not be overlooked. Note what was there said: "Assuredly our prosecutors are aware that the concept of double jeopardy is designed to prevent the government from unduly harassing an accused, and we are confident that they will not resort unfairly to multiple indictments and successive trials in

order to accomplish indirectly that which the constitutional interdiction precludes."

We rule that the defendant's plea of former jeopardy must be denied.

We have examined matters which we are required to review upon the record under S. Ct. Rule 28.02, V.A.M.R., and find no reversible error therein.

The judgment is hereby affirmed.

/s/HENRY J. WESTHUES, Presiding Judge
All concur

Clerk's Certificate to foregoing paper omitted in printing.

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE
APRIL SESSION, 1966

No. 51,798

STATE OF MISSOURI, *Respondent,*

vs.

BOB FRED ASHE, *Appellant.*

Opinion—Filed June 13, 1966

Appeal from the Circuit Court of Jackson County

The Honorable Paul E. Vardeman, Judge

On June 22, 1960, appellant was convicted by a jury of robbery in the first degree, and under Section 556.280, V.A.M.S., was sentenced by the court to 35 years' imprisonment, which judgment was affirmed. State v. Ashe, Mo., 350 S.W. 2d 768. He has since moved under Criminal Rule 27.26, V.A.M.R., to vacate that judgment and sentence and has appealed from the order denying his motion without a hearing.

Statements of facts in more detail may be found in State v. Ashe, supra, and State v. Johnson, Mo., 347 S.W. 2d 220, but for purposes of this proceeding a brief statement will suffice. In the early morning of January 10, 1960, a poker game was in progress in a home in Lees Summit,

Jackson County, Missouri. A substantial sum of money was on the table when four men armed with a shotgun and pistols entered the room and took the money and money, rings, watches, and other valuables from the six players. Shortly afterward appellant, Eric Larson, Thomas Brown, and John Edward Johnson were arrested and charged with robbery and with stealing an automobile. A preliminary hearing was held on January 28, 1960, and all four men were ordered held for trial in the circuit court. Thereafter seven informations were filed involving appellant among which were C-29766 charging robbery of one Knight and C-29768 charging robbery of one Roberts. On May 2, 1960, appellant was acquitted of charge C-29766, and on June 20, 1960, he was brought to trial on charge C-29768, at which time he filed a Motion to Dismiss Autrefois Acquit based on the acquittal and judgment previously described. The only point on the original appeal was that the court erred in not sustaining the motion to dismiss.

Appellant now alleges that "the court erred in failing to sustain * * * (his) motion to vacate, the appellant having been placed in former jeopardy and acquitted upon the same alleged offense in a cause wherein the identical evidence was introduced." He admits that the "Court * * * held this not to be have been dohble jeopardy, State v. Ashe, (Mo. 1961) 350 S.W. 2d 768," and since this precise issue previously was adjudicated adversely to appellant, he is precluded from litigating the question further by means of a motion to vacate under Rule 27.26, supra. State v. Thompson, Mo., 324 S.W. 2d 133, 139[8]; State v. Morton, Mo., 349 S.W. 2d 914, 915[2]. Appellant suggests, however, that the decision of this court on original appeal "in view of the great number of recent decisions of the Supreme Court of the United States * * * is no longer in line with authority and should be overruled and the Appellant discharged * * *." Appellant's citations of State v. Clark, Mo. App., 289 S.W. 963, State v. Toombs, Mo., 34 S.W. 2d 61, State v. Bockman, Mo., 124 S.W. 2d 1205, Green v. United States (1957), 355 U.S. 184, and United States v. Maybury (1960), 274 F. 2d 899, do not support his suggestion because they predate the original appeal in this case; and Hoag v. New Jersey, 356 U.S. 464, was discussed in the original appeal at 350 S.W. 2d l.c.

770. Appellant's only later citation, Downum v. United States, 372 U.S. 734, is clearly distinguishable. There the jury was sworn to try six counts against defendant and was thereafter discharged because the prosecuting witness essential to two counts was absent. Defendant moved to dismiss those two counts, the move was opposed by the prosecution, and, subsequently, a jury was impaneled to try those counts. The court held that the defendant was twice in jeopardy because the court's action permitted the prosecution to correct circumstances in which the defendant would have been acquitted, thus permitting a second trial of the exact same charge, a situation different from that in the original appeal of this case.

Appellant charges denial of due process of law by saying there was no preliminary hearing prior to the filing of the information upon which he was convicted. This charge is refuted on the face of appellant's motion because it recites that a preliminary hearing was held prior to the filing of the several informations against him and his companions; and, despite his statement to the contrary, the record shows that he proceeded to trial without objection in which case the right to object to any defect in connection with the preliminary hearing or lack of such hearing was waived. State v. Taylor, Mo., 243 S.W. 2d 301, 302[1]; State v. McMillian, Mo., 383 S.W. 2d 721, 722[3]; State v. Small, Mo., 386 S.W. 2d 379, 381[3].

Appellant's motion also charges that he was denied constitutional rights by the refusal of his instruction A and that his trial was by a prejudiced jury and judge. Neither of these assignments is briefed on this appeal and they are deemed waived or abandoned. Criminal Rule 28.02, V.A.M.R.

Appellant contends that he was entitled to a hearing and findings of fact and conclusions of law on his motion, but since the preceding matters are determinable from the face of the motion and from the "files and records of the case" before the court, a hearing, findings, and conclusions were not required, Rule 27.26, supra; appellant was entitled to no relief, and the judgment is affirmed.

Clerk's Certificate to foregoing paper omitted in printing.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 1112

BOB FRED ASHE, *Petitioner*,

vs.

HAROLD SWENSON, Warden, *Respondent*.

Petition for Writ of Habeas Corpus—Filed July 27, 1966

* * * *

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Double Jeopardy. Petitioner's conviction arouse out of an alleged robbery of six (6) men at a poker game. On May 2, 1960, he was tried and acquitted by a jury of the robbery of one of the six (Cause No. C-29766, Jackson County, Mo. Circuit Court). This conviction arouse out of a trial in which he allegedly robbed another of the six. The victim in the first trial testified in the second in the same manner as he had in the first trial where petitioner was acquitted.

(b) Only one preliminary hearing was held. After that preliminary hearing seven (7) informations were filed against petitioner. One alleging the robbery of each victim and one alleging the theft of an automobile. One of the six victims did not testify at this one preliminary. Missouri law prohibits the consolidation of causes in Magistrate Court except upon the motion of the defendant and no such motion was made in the preliminary. Thus petitioner was denied due process of law.

* * * *

(Signature line and jurat omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 1112

BOB FRED ASHE, *Petitioner,*

vs.

HAROLD R. SWENSON, Warden, *Respondent.*

Stipulation—Filed October 28, 1966

Comes now Robert G. Duncan, attorney for petitioner, and Donald Randolph, Assistant Attorney General, attorney for respondent, and stipulate and agree as follows:

1. That petitioner has fully exhausted the remedies afforded him under the laws of the State of Missouri for the relief he seeks in this habeas corpus proceeding.

2. That the following documents may be received in evidence and considered by the Court in its determination of the issues herein without further identification, certification, authentication or introduction:

• • • •

3. That petitioner was charged in causes #C-29762, C-29764, C-29766, C-29768, C-29770, C-29772 and C-29774, in the Jackson County, Missouri Circuit Court, and that all said charges arose out of the alleged robbery of six men at one location at one card game on January 10, 1960.

4. That Don Knight testified he was robbed in both of petitioner's trials in cause #s C-29766 and C-29768, of the Jackson County Circuit Court.

5. That on April 25, 1960, John Edward Johnson, was convicted in a separate trial in cause #C-29766 of the Jackson County Circuit Court.

6. That on or about May 18, 1960, Eric Lafe Larson, was convicted in a separate trial in said cause #C-29766.

7. That petitioner is presently confined in the Missouri State Penitentiary at Jefferson City, Missouri, under sentence to 35 years in cause #C-29768 in the Jackson County, Missouri Circuit Court.

8. That only one preliminary hearing was held prior to the filing of the seven informations mentioned in paragraphs 2(a) through (g) and the testimony therein is contained in the transcript mentioned in paragraph 2(h).

9. That petitioner shall file a brief herein on or before 45 days from the filing and approval of this Stipulation.

10. That Respondent shall file herein a brief within 30 days after the filing of Petitioner's brief.

11. Petitioner may file a reply brief within 10 days after the filing of Respondent's brief.

12. No further evidence or hearing, unless ordered by the Court, need be held or introduced other than this Stipulation and the documents mentioned herein.

13. This Stipulation is not binding or effective until approved by the Court.

(Signature lines and jurat omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 1112

BOB FRED ASHE, *Petitioner,*

vs.

HAROLD R. SWENSON, Warden, *Respondent.*

Memorandum and Order—Filed July 27, 1967

Petitioner, an inmate at the Missouri State Penitentiary at Jefferson City, has filed this petition for a writ of habeas corpus. The petition raises questions of double jeopardy and general due process in violation of the due process clause of the Fourteenth Amendment.

In the direct appeal from his conviction, reported in *State* v. *Ashe,* Mo. 1961, 350 S.W. 2d 768, the Supreme Court of Missouri fully considered the double jeopardy questions raised in the present petition and discussed the questions in light of the applicable federal standards. The Supreme Court of Missouri again considered and discussed the questions in an appeal from a denial of a motion pur-

suant to Rule 26, Mo. S. Ct., reported in *State* v. *Ashe*, 403 S.W. 2d 589.

It is clear, therefore, that this Court has present jurisdiction over this case because petitioner has exhausted his available state remedies. *White* v. *Swenson*, W.D. Mo. en banc, 1966, 261 F. Supp. 45.

The essential facts were stated by the Supreme Court of Missouri in its opinion on petitioner's direct appeal. In the early morning hours of January 10, 1960, four men entered the home of John Gladson in Lee's Summit, Missouri. Present in the home at the time were Mrs. Gladson, who was in her bedroom, her husband, John Gladson, Don Knight, Jerry Freeman, Orville Goodwin, Richard McClendon and Ray Roberts. The men were in the basement of the home playing poker. The four men entered the basement armed with one shotgun and at least two pistols. The poker players were ordered to remove their pants. The four men then took money from the poker table and also from the persons of each of the poker players' money, rings, watches, and other valuables.

The petitioner was tried on May 3, 1960 on an information charging him with having robbed Don Knight. That tiral resulted in a jury verdict of not guilty. The petitioner was then tried on June 22, 1960, on a separate information charging him with having robbed Ray Roberts. The second trial involved the same alleged incident as the first trial. The second trial resulted in a jury verdict of guilty.

On appeal from his conviction in the second trial, petitioner argued, as he does in this Court, that the second trial constituted double jeopardy because there was only one robbery of which petitioner was acquitted in the first trial. The Supreme Court of Missouri held that under Missouri law where one accused robbed two or more persons at the same time the offender may be indicted and convicted for the robbery of each of the persons as a separate and distinct offense. See 350 S.W. 2d at 770. That court held in substance that separate prosecutions for what it held were different offenses did not constitute double jeopardy.

The Supreme Court of Missouri considered whether the separate offenses could be tried in separate trials. In discussing the meaning of the jury verdicts in both of petitioner's trials, that court stated:

> It is urged that in the [first] case where Ashe was acquitted the same issues were tried as in the present case wherein Ashe was convicted. It is true that in each case much of the evidence was of necessity the same. However, the ultimate and main issue in the first case was, did Ashe rob Don Knight? A jury by its verdict found that he did not. In the case now before us, the vital issue was, did Ashe rob Ray Roberts? A jury by its verdict found in the affirmative. Are those verdicts inconsistent? Not necessarily so. In the trial where Knight was the person alleged to have been robbed, the jury may not have believed beyond a reasonable doubt that any property was taken from Knight. In the case now before us, the jury found that property was taken from Roberts.

The factual circumstances of this case present an almost identical situation as the case of *Hoag* v. *New Jersey*, 356 U.S. 464 (1958). Four persons were robbed in a tavern. The petitioner was first tried for the alleged robbery of three of those persons. He was acquitted. Petitioner was subsequently tried for the alleged robbery of the fourth person and was convicted. The Supreme Court held that his conviction did not violate the Due Process Clause of the Fourteenth Amendment or the Double Jeopardy Clause of the Fifth Amendment as carried over under the Fourteenth Amendment as a restriction on the States. The Supreme Court did not reach the question of whether the doctrine of collateral estoppel can be regarded as a constitutional requirement.

The collateral estoppel question was not decided because the majority of the Supreme Court felt bound by a determination of the state court that issues other than the issue of identity of the defendant were litigated in the first trial and that it was impossible to say on which issue the jury based its verdict of not guilty. The Supreme Court of Missouri, in petitioner's case, also intimated that issues other than petitioner's identity were litigated in his first trial.

Hoag v. *New Jersey, supra,* so nearly identical to this case in its factual situation, is the last decision of the Supreme Court of the United States on the issues raised here, and that case is binding on this Court. Because the

same arguments presented here were rejected by the Supreme Court in *Hoag* and in *Ciucci* v. *Illinois*, 356 U.S. 571 (1958), this Court must deny the relief sought by petitioner.

However persuasive the dissenting opinions in the *Hoag* case may be, it is the duty of this Court to follow the law as stated by the Supreme Court of the United States until it expresses a contrary view. Certainly the factual circumstances of this case provide an excellent opportunity for reexamination of the questions presented. An examination of the transcript of both trials shows that in both the single issue in real contest, as distinguished from the issues that may be said to have been in technical dispute, was the question of whether petitioner was or was not present at the time the money was taken from the poker table and the other property taken from persons of the respective poker players.

For the above stated reasons, it is

ORDERED that the petition be, and is hereby, denied with prejudice.

JOHN W. OLIVER
District Judge

Kansas City, Missouri
July 27, 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,013

BOB FRED ASHE, *Appellant*,

v.

HAROLD R. SWENSON, Warden, *Appellee*.

Appeal from the United States District Court for the Western District of Missouri.

Opinion—Filed July 30, 1968

Before VAN OOSTERHOUT, Chief Judge, BLACKMUN, Circuit Judge, and VAN PELT, District Judge.

BLACKMUN, Circuit Judge.

This habeas corpus appeal by a state prisoner presents to us the question of the continuing validity of *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), a decision in which the Supreme Court divided five-to-three, with Mr. Justice Brennan not participating, and of *Ciucci* v. *Illinois*, 356 U.S. 571 (1958), a five-to-four decision. Four of the five Justices (Justices Frankfurter, Burton, Clark and Whittaker) who, with Mr. Justice Harlan, comprised the majority in both cases are no longer active members of the Court.

The appellant, Bob Fred Ashe, is serving a 35 year sentence in the Missouri penitentiary. This came about (a) by reason of his conviction by a state jury on June 22, 1960, of the crime of robbery in the first degree in violation of V.A.M.S. § 560.120 (1953);[1] (b) by the punish-

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[1] "§ 560.120. Robbery in the first degree

"Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person . . . shall be adjudged guilty of robbery in the first degree."

ment prescribed by § 560.135[2] for a robbery where a dangerous weapon was used; and (c) by the provisions of the Missouri Habitual Criminal Act, § 556.280 (Ashe had been convicted in federal court in August 1950 for a violation of 18 U.S.C. § 659 (theft from interstate shipment), and also had been convicted in Jackson County, Missouri, Circuit Court in December 1952 for second degree burglary (§ 560.125) and for tampering with a motor vehicle (§ 560.175), and two year sentences imposed with respect to each of these three offenses had been served or commuted).

As grounds for his federal habeas petition Ashe asserts double jeopardy and the absence of due process, in violation of his Fifth and Fourteenth Amendment rights,[3] by reason of a second prosecution after an initial acquittal upon what he claims to be a charge of a single offense. The matter was submitted to the district court on a stipulation and accompanying exhibits. Judge Oliver denied relief but issued the certificate of probable cause required by 28 U.S.C. § 2253.

The issue arises out of what Ashe's brief refers to as "a friendly game of poker" engaged in by six men until the early hours of January 10, 1960, at a private home in Lee's Summit, Missouri. The facts, which really are not in dispute here, are set forth in the opinion of the Supreme Court of Missouri in *State* v. *Ashe*, 350 S.W.2d 768, 769 (Mo. 1961).[4] The home was that of John Gladson. Gladson and five others, namely, Donald Knight, Jerry Freeman, Orville Goodman, Richard McClendon, and Ray Roberts were playing poker in the basement. Mrs. Gladson was at home but in bed upstairs. A substantial amount

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[2] "§ 560.135. Robbery by means of dangerous and deadly weapons—penalty

"Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the penitentiary for not less than five years, and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment in the penitentiary for not less than five years . . ."

[3] The Constitution of Missouri, V.A.M.S. Const. art. 1, § 19, also provides: "That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury . . ."

[4] See, also, *State* v. *Johnson*, 347 S.W.2d 220, 221-22 (Mo. 1961).

in currency and checks was on the poker table. Three men broke into the basement. They were armed with a shotgun and pistols. The players, other than Gladson (the men seemed to know that he had a heart condition) were ordered to remove their trousers and were tied up. The men took items from the table and also took money, rings, watches, and other things from the persons of the players. A man also entered Mrs. Gladson's bedroom, ripped out the telephone there, tied her with the telephone cord, and removed the wedding ring from her finger.

Ashe and John Edward Johnson, Erie Larson and Thomas Brown were all apprehended later that morning. Seven complaints were lodged against each of the four in magistrate court. These charged, respectively, the robbery of each of the six victims and the theft of an automobile belonging to Roberts. On a preliminary hearing all four were bound over to the circuit court for trial. Later seven separate informations were filed. Six of these named Ashe, Larson and Johnson; a seventh, for the car theft, named all four. Another set of six informations was filed against Brown alone.

On May 2, 1960, Ashe went separately to trial before a jury in Jackson County, Missouri, Circuit Court on the charge that he robbed Donald Knight. Four of the six victims (Gladson, Knight, McClendon and Roberts) testified about the event and described their individual losses. The defense offered no testimony and even waived closing argument. The jury returned a verdict of "not guilty due to insufficient evidence".[5]

On June 20, 1960, Ashe, with different counsel, went to trial before a jury in the same state court and before the same judge on the charge that he robbed Ray Roberts. Three of the victims (Knight, Gleason and Roberts) testified at this trial as did Mrs. Gladson who, apparently because of illness, had not appeared as a witness at the first trial. On the Roberts charge the jury returned a verdict of guilty.

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[5] It is stipulated that Johnson was convicted on April 25, 1960, in a separate trial, for the robbery of Knight, and that Larson was convicted on or about May 18, 1960, in a separate trial, also for the robbery of Knight. Brown, in the course of his separate trial on one of the charges against him, pleaded guilty. Johnson's conviction was affirmed on appeal. *State* v. *Johnson*, supra, 347 S.W.2d 220 (Mo. 1961).

Ashe appealed his conviction to the Supreme Court of Missouri. It was affirmed. *State* v. *Ashe,* supra, 350 S.W.2d 768 (Mo. 1961). The court cited, among other cases, *Hoag* v. *New Jersey,* supra.

Four years later Ashe, pursuant to Rule 27.26 of the Missouri Rules of Criminal Procedure, moved to vacate his sentence. This motion was denied by the state circuit court. On appeal, with his present retained counsel, the denial was affirmed. *State* v. *Ashe,* 403 S.W.2d 589 (Mo. 1966). The court again mentioned *Hoag* v. *New Jersey.*

Ashe then filed his habeas petition with the United States District Court for the Western District of Missouri.

Prior to his state trial on the charge of robbing Knight, Ashe unsuccessfully move to quash on the ground of multiplicity of charges. After his acquittal on the Knight charge he unsuccessfully moved to dismiss the other charges filed against him on the ground of double jeopardy. Double jeopardy was asserted on the appeal from his conviction—and apparently was the only issue seriously asserted on that appeal—but the claim was held to be without merit. Pp. 769-71 of 350 S.W.2d. Double jeopardy was also asserted on Ashe's appeal from the denial of his motion to vacate sentence. Pp. 590-91 of 403 S.W.2d. Clearly, therefore, as the State has conceded, any requirement under 28 U.S.C. § 2254 that state remedies be exhausted before applying for federal habeas relief has been satisfied by Ashe.

In *Hoag* v. *New Jersey,* supra, three indictments were returned against Hoag charging that, with two others, he robbed three persons at a tavern. Two other victims of the robbery, one of them named Yager, were not named in the indictments. The three indictments were joined for trial. The state's witnesses were the five victims. Only Yager, however, positively identified Hoag as one of the robbers. Hoag was the sole defense witness. He testified to an alibi. The jury acquitted. Six weeks later a fourth indictment was returned. This named Yager as the robbery victim. At the trial on this indictment only Yager testified for the prosecution. The defense called the other four victims. They testified either that Hoag was not one of the robbers or that positive identification was not possible. Hoag repeated his alibi. This time the jury returned a verdict of guilty. The conviction was affirmed

on appeal by the New Jersey courts. 35 N.J. Super. 555, 114 A.2d 573; 21 N.J. 496, 122 A.2d 628.

The Supreme Court majority refused, on that record, to hold that Hoag's second prosecution and conviction violated due process.[6] They noted that the New Jersey courts, in construing the state's robbery statute, made "each of the four robberies, though taking place on the same occasion, a separate offense" and thus rejected Hoag's claim that the double jeopardy clause of the State's Constitution was violated. "Certainly nothing in the Due Process Clause prevented the State from making that construction". P. 467. The Court went on to say:

> "We do not think that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence. The question in any given case is whether such a course has led to fundamental unfairness. . . . [I]t has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice. . . . In the last analysis, a determination whether an impermissible use of multiple trials has taken place cannot be based on any over-all formula. . . .
>
> "Petitioner further contends that his conviction was constitutionally barred by 'collateral estoppel.' His position is that because the sole disputed issue in the

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[6] It is suggested in Ashe's brief that *Palko* v. *Connecticut*, 302 U.S. 319, 322-28 (1937), where, in an opinion written by Mr. Justice Cardozo, with Mr. Justice Butler alone dissenting and without opinion, the double jeopardy clause of the Fifth Amendment was held not to be applicable, by force of the Fourteenth, to state action, is a holding questionable today. Ashe cites the dissents in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), and the incipience of the issue in *Cichos* v. *Indiana*, 385 U.S. 76 (1966).

We are aware, of course, of the announced differences among the Justices of the Supreme Court in their approaches to the Fourteenth Amendment-Bill of Rights relationship, perhaps exemplified, on the one hand, by what has been described as an approach based on "incorporation" and, on the other, by an approach which takes as its measure "requirements of fundamental fairness 'implicit in the concept of ordered liberty' ". See the several opinions in *Pointer* v. *Texas*, 380 U.S. 400 (1965), and in *Duncan* v. *Louisiana*, . . . U.S. .... (1968). If the Court chooses to review Ashe's case on certiorari, it will face the issue whether this distinction makes a difference and, if so, which route to follow.

earlier trial related to his identification as a participant in the Gay's Tavern robberies, the verdict of acquittal there must necessarily be taken as having resolved that issue in his favor. . . . Although the rule was originally developed in connection with civil litigation, it has been widely employed in criminal cases in both state and federal courts. . . .

"Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Cetrainly this Court has never so held. However, we need not decide that question, for in this case New Jersey both recognized the rule of collateral estoppel and considered its applicability to the facts of this case. . . . In numerous criminal cases both state and federal courts have declined to apply collateral estoppel because it was not possible to determine with certainty which issues were decided by the former general verdict of acquittal." Pp. 467-72 of 356 U.S.

The Chief Justice dissented, asserting that the issue is whether what happened was contrary to the requirements of fair procedure guaranteed by the due process clause. He concluded that it was, and that a suggestion made by the majority that the jury might have acqutited at the first trial because of a failure of proof that property was taken from the victims "is simply unrealistic". Pp. 473-77. Mr. Justice Douglas, joined by Mr. Justice Black, dissented on the ground that Hoag had been forced to run the gantlet twice. He felt that the criminal transaction was indivisible, that the basic facts canvassed were the same, and emphasized that the alibi was tendered once again and that the testimony of the same witness identifying the petitioner was introduced. Pp. 477-80.

Ciucci v. *Illinois,* decided the same day, was a situation where the petitioner was charged in four separate indictments with murdering his wife and three children, all of whom were found dead at the same time. In three successive trials the petitioner was found guilty of the respective murders of his wife and of two of the children. At each trial the prosecution introduced into evidence details of all four deaths. At the first two trials the jury fixed

the punishment at imprisonment for a number of years. At the third trial the penalty imposed was death. It was conceded that under state law each of the murders, although apparently taking place at the same time, constituted a separate crime and it was undisputed that evidence of the entire occurrence was relevant in each of the three prosecutions. In a per curiam opinion the five justices constituting the majority agreed that upon the record as it stood no violation of due process had been shown. *Hoag* v. *New Jersey* was cited. Mr. Justice Douglas, joined by the Chief Justice and Mr. Justice Brennan, dissented, stating that the case was an instance of the prosecution's being allowed to harass the accused with repeated trials and convictions on the same evidence "until it achieves its desired result of a capital verdict". In his view due process prevented this. Pp. 573-75. Mr. Justice Black concurred in the dissent on the ground that the Fourteenth Amendment bars a state from placing a defendant twice in jeopardy for the same offense. P. 575.

At this point we note that the Supreme Court of Missouri on Ashe's direct appeal aligned itself, with no dissent, with what it called "an overwhelming weight of authority" and held that where an accused robs two or more persons at the same time a prosecution for one of the robberies does not prevent a subsequent prosecution for another. P. 770 of 350 S.W.2d. It observed that "the ultimate and main issue in the first case was" whether Ashe robbed Knight and that the vital issue in the second case was whether Ashe robbed Roberts. It stated that the two verdicts were not necessarily inconsistent. It referred to the doctrine of collateral estoppel and seemingly refused to apply it, noting the New Jersey court's statement, also noted by the Supreme Court, p. 467 of 366 U.S., footnote 3, expressing confidence that prosecutors "will not resort unfairly to multiple indictments and successive trials in order to accomplish indirectly that which the constitutional interdiction precludes". See, also *State* v. *Whitley,* 382 S.W.2d 665, 667-68 (Mo. 1964), where the Missouri court cited its holding in *Ashe* and rejected any suggestion as to a contrary implication in the earlier case of *State* v. *Citius,* 331 Mo. 605, 56 S.W.2d 72 (1932). The Missouri court, therefore, just as did the New Jersey

court in *Hoag*, made "each of the . . . robberies, though taking place on the same occasion, a separate offense", to use Mr. Justice Harlan's words, p. 467 of 356 U.S.

We feel compelled to affirm the district court's denial of habeas relief because:

1. This court is not the Supreme Court of the United States. We therefore are not free to disregard an existing flat and still live holding of the Supreme Court even though that holding is one by a sharply divided tribunal and even though only one of the Justices who participated in the majority decision remains active. A change in constitutional concept and the overruling of an existing decision, if indicated at all, is for the Supreme Court and is not for us. Firmness of precedent otherwise could not exist. Further, we deal here wilth no mere implication or interpretation of language. We are confronted with a specific holding. In this connection we note that, although certiorari apparently was not applied for after the Missouri affirmance on November 13, 1961, on Ashe's direct appeal from the conviction, the membership of the Supreme Court at that time had changed only by Mr. Justice Stewart's succeeding Mr. Justice Burton; the extensive change in membership has taken place only since the time certiorari could have been sought.

2. The state prosecutions of Ashe were for robberies, not for larceny. We note that the Missouri statute, § 560.120, is directed to the felonious taking, by violence or putting in fear of immediate personal injury, of "the property of another from his person, or in his presence", and thus places emphasis on the individual victim.

3. There is no dispute that the criminal action concerned more than the taking of currency and checks from the gaming table. If the evidence were confined to those table items, we might well be dealing with a single offense.

4. A robbery of one man (Roberts) ordinarily requires proof of facts different from those required to prove a robbery of another man (Knight). This is so even though Roberts and Knight are held up and robbed at about the same time. The items taken from Roberts' person are different than the items taken from Knight's person and the personal indignities inflicted on the respective victims

are not the same. See the comments on the "same evidence" test in *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932), and Mr. Justice Brennan's additional opinion in *Abbate* v. *United States,* 359 U.S. 187, 196 (1959).

5. If, as the Supreme Court said in *Hoag,* p. 467 of 356 U.S., "The question in any given case is whether such a conviction has led to fundamental unfairness", then we are led to conclude that the answer to that question here is in the negative. We see nothing so fundamentally unfair as to be of constitutional dimensions. Of course, an all night poker game, with stakes apparently more substantial than those betting them could reasonably afford, may be something less than an enterprise most deserving of protection. But those present in a private home deserve protection, too, against criminal invasion of that home at night at gunpoint. There were multiple participants here and there were multiple victims. Each victim was subjected to abuse. Each was deprived of property on his person. Under the circumstances, to regard the offense against each as a separate and distinct crime and not as a mere part or segment of one overall crime seems to us neither illogical, unfair, or contrary to fact. It strikes us as no more illogical or unfair than inconsistency of verdict on an indictment's several counts. And, as to that, Mr. Justice Holmes reminds us, "Consistency in the verdict is not necessary". *Dunn* v. *United States,* 284 U.S. 390, 393 (1932). This court has recognized that observation. *Koolish* v. *United States,* 340 F.2d 513, 525-26 (8 Cir. 1965), cert. denied 381 U.S. 951; *Canaday* v. *United States,* 354 F.2d 849, 855 (8 Cir. 1966).

6. The acquittal at the first trial, on the charge of robbing Knight, was, the jury said, "due to insufficient evidence". Although we have carefully read the transcripts of both state trials, we have no way of translating or interpreting that jury comment with certainty. Was it made because the jury had a reasonable doubt due to disbelief of certain witnesses, or because of gaps, real or imagined, in the evidence, or because of a paucity of evidence as to Knight's personal loss, or because of some reservation about Ashe's identity or participation? We do not know. The mere listing of these possibilities lends emphasis to the fact that the first trial concerned Knight

and that those several possibilities assume importance with respect to the Knight charge. The Roberts charge is something else.

7. Ashe's case, we feel, is stronger factually for the prosecution than Hoag's. The positive evidence here is consistent. In *Hoag* there was some positive denial of identification.

It usually is difficult for a lower federal court to forecast with assurance a Supreme Court decision as to the continuing validity of a holding of a decade ago by a Court then divided as closely as possible. This is particularly so when the decision is in the rapidly deveolping and sensitive area of the criminal law and the Fourteenth Amendment-Bill of Rights relationship. We feel, however, that our task is not to forecast but to follow those dictates, despite their closeness of decision, which at this moment in time are on the books and for us to read. *Hoag* v. *New Jersey* and *Ciucci* v. *Illinois* are among these. See the comments of Judge Mehaffy, in speaking for this court, in *Ferina* v. *United States*, 340 F.2d 837, 839 (8 Cir. 1965), cert. denied 381 U.S. 902. In the light of the commands of *Hoag* and *Ciucci*, we affirm Judge Oliver's decision denying habeas relief to Ashe.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 709 Misc.

BOB FRED ASHE, *Petitioner*,

v.

HAROLD R. SWENSON, *Warden*

Order Granting Motion for Leave To Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—March 3, 1969

On petition for writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to

proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1099 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

PETITION NOT PRINTED

RESPONSE NOT PRINTED

No. 57

BOB FRED ASHE,

Petitioner,

v.

HAROLD R. SWENSON, Warden
Missouri State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 57

BOB FRED ASHE,

Petitioner,

v.

HAROLD R. SWENSON, Warden
Missouri State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals (A. 236) is reported at 339 F. 2d 40 (8th Cir. 1968).

The opinion of the District Court (A. 232) is reported at 289 F. Supp. 871 (W.D. Mo. 1967).

The opinion of the Supreme Court of Missouri (A. 227) affirming denial of motion to vacate sentence is reported at 403 S.W. 2d 589 (1966).

The opinion of the Supreme Court of Missouri (A. 223) affirming the conviction is reported at 350 S.W. 2d 768 (1961).

Jurisdiction

The judgment of the Court of Appeals was entered July 30, 1968 (A. 236). The petition for a Writ of Certiorari was filed August 17, 1968 and was granted March 3, 1969. The jurisdiction of this Court rests on Title 28 United States Code, Sec. 1254(1).

Provisions of Law Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides in part:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State de-

prive any person of life, liberty, or property, without due process of law. . . ."

Article 1, Section 19, Constitution of Missouri, 1945 provides:

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury. . . ."

Section 560.120, Missouri Revised Statutes, 1959, provides:

"Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk, or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree."

Section 560.135, Missouri Revised Statutes, 1959, provides:

"Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the penitentiary for not less than five years, and every person convicted of robbery in the first degree by any

other means shall be punished by imprisonment in the penitentiary for not less than five years. . . ."

Supreme Court Rule 27.26, Missouri Revised Statutes, 1959, provides:

"A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, . . . may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. . . . If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. . . . "

Question Presented

May the State put a defendant again in jeopardy by relitigating an issue of fact tried by a jury and necessarily found in his favor in a criminal case when

(a) the occasion for the attempted relitigation is a subsequent criminal prosecution against the same defendant arising from the same transaction and

(b) in the second prosecution, as it was in the first, the issue of fact litigated is essential to the question of guilt?

Statement

During the early hours of January 10, 1960, six men were engaged in a poker game in the basement of the home of John Gladson at Lee's Summit, Missouri. Mr. Gladson was one of the participants. The five others were Donald Knight, Jerry Freeman, Orville Goodman, Richard McClendon, and Ray Roberts. Mrs. Gladson was in bed upstairs (A. 8).

A substantial amount of money in currency and checks was on the poker table. Three masked men broke into the basement armed with a shotgun and pistols (A. 16-17). The players other than Gladson (the men seemed to know that he had a heart condition) (A. 9) were ordered to remove their trousers and were tied up. The three men took the items from the table and also took money, rings, watches, and other property from the persons of the players (A. 10, 24, 34). A man also entered Mrs. Gladson's bedroom, ripped out the telephone and tied her with the telephone cord (A. 18). The robbers then departed in Roberts' automobile, which was parked outside the Gladson house (A. 25).

Shortly thereafter, Roberts' car was found by a security guard in a field some distance away. The guard observed three men, who then ran away from the car (A. 47-48). A shotgun was found in back of the car and the State Highway Patrol was summoned (A. 49).

John Edward Johnson, Eric Larson and Thomas Brown were apprehended later that morning by one State trooper not far from where the car was discovered (A. 60-61). The Petitioner was arrested by a second man from the State Patrol (A. 64).

Seven complaints were filed against each of the four in Magistrate Court. These charged, respectively, the robbery of each of the six poker players and the theft of Roberts' automobile. On a preliminary hearing all four were bound over to the circuit court for trial. Later seven separate informations were filed. Six of these named the Petitioner, Larson, and Johnson; a seventh, for the car theft, named all four. Another six informations were filed against Brown alone.

On May 2, 1960, the Petitioner went separately to trial in Jackson County, Missouri Circuit Court on an amended information citing prior convictions and charging him for the robbery of Donald Knight (A. 5). Four of the six victims (Gladson, Knight, McClendon and Roberts) testified about the event and described their individual losses. Roberts and McClendon gave testimony implicating the Petitioner. Gladson could make no positive identification of him (A. 11), and Knight could not identify anyone (A. 21). The defense offered no testimony and waived closing argument. The jury's verdict was "not guilty due to insufficient evidence" (A. 90).

The State then proceeded to try the Petitioner on the second of the seven informations filed against him, amended to make the Missouri Habitual Criminal Act applicable and charging robbery of Ray Roberts (A. 94). On June 21, 1960 the Petitioner filed his Motion to Dismiss Autrefois Acquit (A. 97). The motion was taken up, heard, considered by the circuit court, and overruled (A. 104).

On the same day, June 21, 1960, the Petitioner's second trial began in the same state court and before the same judge on the charge of robbing Ray Roberts. Mrs. Gladson gave testimony, and three of the basement victims who

testified at the first trial—Knight, Gladson and Roberts—were called again. Mr. McClendon was not called. This time John Gladson and Ray Roberts identified the accused as one of the robbers. This time the jury returned a verdict of guilty (A. 220), and on October 10, 1960 judgment was entered sentencing the Petitioner to 35 years in the penitentiary of the State of Missouri (A. 222).

The Petitioner appealed his conviction to the Supreme Court of Missouri, asserting double jeopardy and urging the application of collateral estoppel. The conviction was affirmed (*State* v. *Ashe,* 350 S.W.2d 768 [1961]). The court ruled that the Petitioner had not been placed in double jeopardy and refused to apply collateral estoppel, citing among other cases, *Hoag* v. *New Jersey,* 356 U.S. 464 [1958].

Four years later the Petitioner, pursuant to Rule 27.26 of the Missouri rules of criminal procedure, moved to vacate his sentence, again asserting double jeopardy and collateral estoppel. The motion was denied by the state circuit court and on appeal the denial was affirmed (*State* v. *Ashe,* 403 S.W.2d 589 [1966]). The court again cited *Hoag* v. *New Jersey, supra.*

On July 27, 1966 the Petitioner filed his habeas corpus petition with the United States District Court for the Western District of Missouri. Double jeopardy and collateral estoppel again were asserted. On July 27, 1967, citing *Hoag,* the district court denied the petition for habeas corpus. (*Ashe* v. *Swenson,* 289 F. Supp. 871 [W. D. Mo. 1967].)

On September 18, 1967 the Petitioner appealed from the decision of the district court to the United States Court

of Appeals for the Eighth Circuit. The court of appeals, on July 30, 1968, affirmed the action of the district court. (*Ashe* v. *Swenson*, 399 F.2d 40 [8th Cir. 1968].)

Summary of Argument

The State of Missouri violated the Fourteenth Amendment to the Constitution when, after Petitioner's criminal trial ended in acquittal because the jury determined in his favor the question of his participation in a single robbery episode, it again litigated this same essential issue in a second criminal trial.

A. The verdict of the jury at the Petitioner's first trial, "not guilty due to insufficient evidence," resulted solely from the State's failure to prove that the Petitioner was one of the robbers. The most careful review of the record of that trial leads inevitably to the conclusion that there could have been no other basis for the verdict. Four of the victims testified, each solidly establishing the basic facts surrounding the commission of the crime. Only two of them, however, offered testimony purporting to place the Petitioner on the scene and cross-examination brought out significant weaknesses in their testimony on that point. The defense did not dispute the State's case apart from the question of Petitioner's participation. It introduced no evidence of its own and waived final argument. Against a background of uncontroverted evidence of armed robbery by a group of men, the jury found that the Petitioner's guilt had not been established by adequate proof.

B. The charge upon which the Petitioner was tried a second time was based upon the same occurrence and was

identical to that involved in his first trial except that it named a different victim and different property. Much of the evidence offered by the prosecutor to prove the second charge was the same as that used in the attempt to prove the first charge, except that greater efforts were made to establish the identification of the Petitioner. In each case, the prosecutor relied on proof purporting to show that a group of men acting in concert robbed all the victims and that the Petitioner was one of the group. No evidence was presented of specific acts allegedly committed by the Petitioner amounting to an offense against the victim specified in either charge. Both juries were called upon to determine the identical question of the Petitioner's participation as one of the group of robbers. The first jury's determination that the Petitioner was not one of the group cannot be reconciled with the second jury's contrary conclusion.

C. By relitigating the same issue of fact against the same defendant in a second trial arising from the same occurrence, the State of Missouri violated the Due Process clause of the Fourteenth Amendment. The protections of the first eight amendments to the Constitution are made applicable to the states by the Due Process clause insofar as they deal with principles fundamental to our concepts of justice. In *Palko* v. *Connecticut*, 302 U.S. 319 (1937), the Court held only that a state could retry an accused on the principal charge after his conviction of a lesser included offense was reversed on appeal by the state for legal error. Such a procedure was judged not to contravene the essence of the ban on double jeopardy to the extent that it might be incorporated in the Due Process clause of the Fourteenth Amendment. However, the Court

noted that less technical and more fundamental instances of double jeopardy might encroach upon Fourteenth Amendment rights. Such rights were violated in this case because the action taken by the State of Missouri goes to the "basic core" of the double jeopardy concept.

In determining that the Petitioner's second trial was undertaken in violation of the Fourteenth Amendment, the Court need not conclude that both trials involved the "same offense" within the literal language of the Fifth Amendment. Due process requires compliance not with the technicalities but with the substance of the principles underlying the rule against double jeopardy.

By sensitive application of the doctrine of collateral estoppel developed in civil cases, the courts have sought to maintain meaningful substance in the double jeopardy concept under circumstances of the modern codification of criminal law. Although the applicability of the doctrine of collateral estoppel in criminal proceedings has created some controversy in marginal areas, its utilization here is essential to preserve the basic rights guaranteed by the Fifth and Fourteenth Amendments. Due process is denied when a defendant is placed twice in jeopardy on the cardinal issue of his participation in a single criminal transaction.

ARGUMENT

The State of Missouri Violated the Fourteenth Amendment to the Constitution of the United States by Litigating at a Second Criminal Trial of the Petitioner the Question of His Participation in a Single Robbery Episode.

A. By Its Verdict, "Not Guilty Due to Insufficient Evidence," the Jury at the Petitioner's First Trial Determined That the State Had Failed to Prove He Participated in the Crime.

It is clear from the transcript of the first trial that the identification of the accused was the only contested issue. No rational analysis could support the hypothesis that the State somehow failed to convince the jury that some group of men had committed the crime of robbery against Donald Knight and others. The controverted issue was not whether Knight had been robbed, but only by whom. The testimony of any one of the victims was sufficient to establish the basic elements of the crime, and four of the victims testified. Each gave essentially the same version of the entire sequence of events, but left in doubt the issue of Petitioner's participation.

It was directly established that the victim named in the charge in this first trial, Donald Knight, suffered a monetary loss (A. 17). The defense made no effort to refute any of this evidence and even waived final argument. At the close of the evidence the judge instructed the jury that Knight's loss of "any money," together with other facts, would sustain a finding of guilty (A. 86). Another instruction suggested to the jury the standard language for a general verdict, "we find the defendant not guilty of rob-

bery . . . " (A. 89). Instead the jury responded, "we . . . find the defendant . . . not guilty *due to insufficient evidence*" (A. 90).

On the record, it is clear that only one essential element of the proof could have been considered as insufficiently established. That element was the identification of the accused as one of the group that committed the robbery.

Donald Knight said there were three robbers (A. 17, 20), but that he could not identify any of them "because I never did get a good look at them" (A. 21). John Gladson, closely examined, said he recognized one of the men because his mask slipped during the robbery (A. 10). He too, said that three masked men had broken into the basement and committed the actual acts of robbery (A. 9), but he could not identify the Petitioner as a participant (A. 11).

Only two of the victims gave any support to the State's contention that the Petitioner was one of the robbers. The first was McClendon, Petitioner's uncle by marriage. But McClendon based his identification solely upon the fact that when he heard the Petitioner's voice at the police line-up it "sounded very much like" one he had heard at the scene of the robbery (A. 28-29). He could not be sure, however, that Petitioner had ever been in the basement at the time of the crime and he positively identified the three hold-up men as Johnson, Larson and Brown (A. 29-30).

The other first trial witness on identification, Roberts, was equally inconclusive. He testified consistently with the other victims that only three men had broken into the Gladson basement (A. 33, 43, 46). He claimed to recognize the Petitioner by recalling generally the "size and actions" of the robbers. He was unable to state what any of them

had done; he could not identify the Petitioner by voice and he admitted he had never seen his face (A. 43-45).

The glaring insufficiency of the State's effort to place Petitioner on the scene is not merely the weakest of several factors that could have concerned the jury. Instead, it is the only factor which could have caused them to acquit on the ground of "insufficient evidence."

The transcript of the Petitioner's second trial dramatically shows the prosecution's recognition that the first acquittal had been for lack of identification. Heavy and careful emphasis was now placed on that issue. Each of the victims who testified was moved to offer something on the point. Knight, who at the first trial was unable to identify any one as a participant, this time remembered that one of the three robbers spoke as though he "had much in his mouth, thicked-tongued" (A. 116). Gladson, who at the first trial could identify only Brown as a participant, now placed the Petitioner as one of the three actual robbers, citing his size, his hair and stating that he remembered him as a robber who could not speak plainly (A. 129-30). Roberts still spoke of "size and actions" but now added that he remembered one of the robbers "seemed like he had something wrong with his voice, mush in his mouth . . .," and that this factor had contributed to his identification of the Petitioner at the line-up (A. 145, 155). Next Trooper Ferguson, the arresting officer, testified:

> "A. He (Ashe) showed me his tongue. He had a laceration back on the tongue, more in the middle part, it looked to me like, it still had sutures in the tongue, and it was causing him—it was bleeding and he kept spitting this blood from this lacerated tongue. It was swollen and made it hard for him to talk.

"Q. How did it affect his speech?

"A. He didn't talk too coherently, talked sort of like he had a mouthful of something, something in his mouth, sort of a mushy sort of speech. His tongue was swollen quite a bit. It was giving him—he kept telling me it was giving him some pain" (A. 178-79).

All three of the victims who testified at this second trial—Gladson, Knight and Roberts—gave testimony purporting to identify the Petitioner as one of three men who carried out the actual robbery (A. 116, 129-30, 145-46, 156). McClendon, Petitioner's uncle by marriage and the witness who knew him best, at the first trial had positively stated that the, three actual participants in the holdup were Johnson, Larson and Brown. But McClendon was not called by the State to testify at the second prosecution.

After having heard this much-refined and carefully selected testimony on the issue of identification, along with virtually the same evidence on the general details of the occurrence, the second jury, on the same instructions as had been given to the first, returned a verdict of guilty against the Petitioner.

B. The Offense Alleged at the Second Trial Required Proof of the Same Essential Fact of Participation That the State Had Already Failed to Establish.

The Information on which the Petitioner's second trial was based (A. 94) is almost identical to the Information used at the first trial (A. 5). Both allege the offense of Robbery, said to have been committed at the same time and place. The only differences are that each names a different victim and lists different property taken.

The evidence surrounding the sequence of events, from the interruption of the poker game through the arrest of the four suspects, was presented to both juries essentially in the same manner. At each trial a number of the victims gave their versions of what happened at the Gladson home. They left not the slightest doubt that a group of men collectively robbed each of the poker players.

The Missouri Supreme Court erroneously oversimplified the ultimate questions in each of the two trials as being, respectively, "Did Ashe rob Don Knight?" and, "Did Ashe rob Ray Roberts?" (A. 225). It speculated, without any justification from the record, that the first jury might not have believed that any property was taken from Knight (A. 225-6). But the record shows that the single question at issue in both trials was whether Ashe was one of the group who, at the same time and place, robbed both Knight and Roberts.

The State's case, in both trials, was based on the concept of a group of men, acting in concert, robbing individuals who were gathered together. Its theory of prosecution was never to prove particular acts of the accused against the particular victim named in the information, and in fact it presented no such evidence. The few instances in the record which tend to show that particular robbers did certain things add nothing to the case against the Petitioner except insofar as they contribute to the account of the group's activities.

The first jury, to convict, had to answer not one but two basic questions in the affirmative: "Did a group of men rob Don Knight?" and "Was Ashe one of the group?" The fact of the robbery was not challenged and the answer to the first question had to be an obvious, uncontroverted

affirmative. Since the jury acquitted, its finding as to the second was a clear negative.

The second jury also had two questions to resolve: "Did a group of men rob Ray Roberts?" and "Was Ashe one of the group?" The first question, again, posed no difficulty. The other was precisely the same question on which the first jury had found an insufficiency of evidence to convict. The State, however, succeeded in eliciting enough testimony on identification to satisfy the second jury.

The issue of Petitioner's identity was itself the identical and the sole disputed issue in both trials. The same group indisputably robbed Knight and Roberts, at the same time and place. Petitioner's acquittal on the charge that he was one of the group that robbed Knight cannot be reconciled with the subsequent verdict that he was one of the group that robbed Roberts. And in subjecting the Petitioner twice to criminal trial on this same issue, the State of Missouri violated his constitutional rights.

C. The State of Missouri Violated Petitioner's Rights Under the Due Process Clause of the Fourteenth Amendment by Placing Him a Second Time in Jeopardy on the Key Question of His Participation in the Robbery.

1. *The State Action Infringed the Basic Principles Underlying the Ban on Double Jeopardy.*

The action of the State in relitigating the same cardinal issue against the Petitioner following his acquittal is inconsistent with the rights guaranteed by the Constitution of the United States. The Fifth Amendment specifically prohibits placing an individual in jeopardy twice for the

same offense. But the principles of justice which this prohibition is designed to protect go beyond instances of repeated criminal prosecution on the identical charge. The same vice is inherent in any situation in which an individual is subjected to the harassment of repeated criminal prosecution based on disproven assertions of criminal complicity.

Were such repeated trials to be permitted, eventual conviction of a defendant would be assured, regardless of the merits of the charge. No individual defendant could match the resources at the command of the prosecution, and the ultimate depletion of his means and will to defend himself would be inevitable. In addition, successive trials of the same issue of fact would permit the prosecution to perfect its presentation by remedying the deficiencies of proof which led to the earlier acquittal. Insufficiencies of evidence could be supplemented and testimony adverse to the theory of prosecution could be observed and omitted in the subsequent trial. *Commonwealth* v. *Thatcher,* 364 Pa. 326, 71 A.2d 796, 798 (1950).

Accordingly, the fundamental core of the Fifth Amendment protection against double jeopardy must be found to have been carried over to the states under the Due Process clause of the Fourteenth Amendment. *United States ex rel. Hetenyi* v. *Wilkins,* 348 F.2d 844, 855 (2d Cir. 1965). Certainly the threat and the actuality of subsequent prosecution resting on the identical key issue of fact previously adjudicated in a defendant's favor is inconsistent with the concept of ordered liberty which the Fourteenth Amendment was designed to guarantee.

The Court need not decide in this case where the specific guarantees of the Fifth Amendment against double jeop-

ardy are carried over *in toto* by the Fourteenth Amendment and hence made binding against the various states. There is, therefore, no necessity to overrule the holding in *Palko* v. *Connecticut*, 302 U.S. 319 (1937) which found no violation of the Due Process clause in a Connecticut statute which permitted the state to retry a defendant on a principal charge after his conviction of a lesser included offense was reversed on appeal by the state for legal error. As noted by Mr. Justice Cardozo in *Palko:*

> "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. . . . This is not cruelty at all, nor even vexation in any immoderate degree." 302 U.S. at 328.

The present case is the antithesis of *Palko*. There the Court found that what technically might qualify as double jeopardy involved no deprivation of due process. Here what might not be double jeopardy under a narrow, technical reading clearly subjected the Petitioner to a burden inconsistent with the due process guarantee. The Court is faced here with the situation which *Palko* reserved for later decision. The disputed question in Petitioner's first trial was whether he was one of the band who robbed a group of men including Donald Knight and Ray Roberts.

In a trial free from error, he was acquitted because the jury found insufficient evidence. Thereafter he was tried again and his fate again rested on the identical issue—whether he had been one of the band who robbed a group of men including Ray Roberts and Donald Knight. The second jury reached a conclusion opposite to the first and found the Petitioner guilty.

There is, it should be noted, no necessity for Petitioner to urge or for this Court to find any impropriety in the State of Missouri's motivation in trying Bob Fred Ashe twice on the same basic issue. No finding of intent to harass or to wear out the accused is essential to a conclusion that his constitutional rights have been violated.

Nor need the Court, in order to provide Petitioner with the constitutional protections implicit in the Due Process clause, determine that the robbery of multiple victims involves a single offense rather than multiple offenses. Constitutional guarantees should not be allowed to turn on niceties of pleading or the technicalities of state codification of criminal law. Here, having been cleared by a jury on the one contested element common and cardinal to each of the seven informations, the Petitioner was protected by the Constitution of the United States from being placed again in jeopardy because of the State's unwillingness to accept the conclusion reached by that jury.

The present record highlights the vices inherent in a policy that permits repeated prosecution grounded on an identical issue of fact. Moreover, the record shows a misuse of Missouri law, under which multiple offenses may be derived from a single criminal transaction, as a vehicle for seeking multiple opportunities to secure conviction of a criminal defendant.

From the standpoint of the prosecution, the testimony in the Petitioner's first trial was unsatisfactory both in what was said and in what was not said. No witness was able positively to identify the Petitioner as one of the robbers. Four of the victims testified and each stated that only three men broke into the Gladson basement and committed the actual acts of robbery (Gladson, A. 9; Knight, A. 17, 20; McClendon, A. 23, 28, 30, 31; Roberts, A. 33, 43, 46). And one of the witnesses, Richard McClendon, specifically identified the three men as Johnson, Larson and Brown, the three defendants in the companion criminal cases (A. 30). The three men named by Mr. McClendon were the same three men arrested by State Trooper Millsap (A. 60-61). Millsap had responded to a call from Mr. Westerfield who, during his night patrol at Unity Farm in the early morning of January 10th, had found three men in a field beside the stolen car (Westerfield, A. 46-50; A. 159-162; Millsap, A. 60-63; A. 170-172). Petitioner Ashe, it might be noted, was separately arrested by State Trooper Ferguson (Ferguson, A. 64; A. 176).

Mr. McClendon's testimony should have been particularly persuasive to the first jury because, of all the witnesses, he was the only one who had any close association with the Petitioner. He was, in fact, the husband of Petitioner's aunt. Of the four victims who testified at the first trial, however, Mr. McClendon was the only one missing at the second trial. The other three were somehow able, the second time around, to place Petitioner as one of the three men who perpetrated the actual robbery, and to do so in flat contradiction to Mr. McClendon's first trial testimony (Knight, A. 116; Gladson, A. 129-30; Roberts, A. 145-6, 156).

The Due Process clause sanctions no such dry run as a prelude to subsequent prosecution. The interests of justice cannot be served and the concept of ordered liberty maintained if the prosecutor is enabled to test his case and, if he proves unsuccessful, to bring the same ultimate issue before a second jury with the benefit of the experience gained in the prior proceeding. In a second prosecution, inadequacies can be rectified, favorable witnesses rehearsed and reenforced and unfavorable testimony eliminated. A policy which permits such a practice infringes the principles inherent in the prohibition against double jeopardy and thus violates the Due Process clause of the Fourteenth Amendment.

It may be that the State of Missouri is entitled to treat the contemporaneous robbery of six victims as six offenses. It may be that the State can proceed to trial separately on each of the six related charges, unless or until a jury acquittal gives rise to an estoppel. *Ciucci* v. *Illinois*, 356 U.S. 571 (1958). But the State cannot, consistent with due process of law, utilize this proliferation of offenses and proceedings as a means to ensure one conviction. It has done so in this case and thus has deprived the Petitioner of his constitutional rights.

The four suspects apprehended shortly after the robbery incident were each charged under seven separate informations. The other three were convicted in the State's first attempt to prove their participation and no effort was made to bring any of them to trial on the other six charges (A. 206). Insofar as the Petitioner was concerned, however, the State was unsuccessful in proving to one jury the fact of his participation. He was therefore brought to trial on a second of the seven charges and, when the second

jury found him guilty, no action was taken with respect to the remaining five. On the State's theory, however, even a second acquittal would not have cleared the Petitioner. There would have been nothing to prevent the prosecution from proceeding on the seventh charge after six juries had absolved him of any involvement in the robbery at the Gladson home. The Constitution contemplates the running of the jury gauntlet but once on such question of complicity. The protection it prescribes cannot be circumvented by ingenuity in defining a multiplicity of offenses arising from a single episode.

The uniform course of the decided cases is consistent with the recognition that there need not be complete identity in the offenses charged in order for the principle involved in the ban against double jeopardy to be invoked. Were identity of offense to be regarded as the key, the Double Jeopardy clause of the Constitution would have been rendered a virtual nullity under the circumstances of modern criminal practice. At common law, a single criminal occurrence was treated as a single offense, regardless of the number of victims involved. The updating of the double jeopardy concept essential to preserve its vitality under modern conditions has occurred primarily through the doctrine of collateral estoppel. Lugar, *Criminal Law, Double Jeopardy, and Res Judicata*, 39 Iowa L. Rev. 317 (1954). As developed in civil proceedings, the doctrine of collateral estoppel prevents the relitigation of the same issue of fact by the same parties. Its underlying rationale is one of convenience and necessity. Social interests demand that the courts not be burdened by litigants unwilling to accept defeat and that there be an end to litigation over a disputed issue of fact.

As applied in criminal cases to protect individual rights, the concept of collateral estoppel has an importance that transcends such mere practical considerations. It becomes in fact essential to the meaningful application of the protection against double jeopardy. Accordingly, it deserves and it has received, at least tacitly, constitutional status.

The outer reaches of the applicability of collateral estoppel in retaining the vitality of the protection against double jeopardy have not as yet been fully determined. This case cannot set those ultimate borders. Instead, it can only afford the opportunity for this Court to give conclusive authority to the proposition that the protection against double jeopardy does not turn on technical distinctions in defining offenses.

The Petitioner's second trial brought the same contesting parties into the same courtroom, before the same judge. *People* v. *Lo Cicero*, 14 N.Y.2d 374, 200 N.E.2d 622 (1964). It presented to a second jury an essential factual issue which the first jury had determined in the accused's favor, not a "mediate" question, *The Evergreens* v. *Nunan*, 141 F.2d 927 (2d Cir. 1944), or a question of law, *Watts* v. *United States*, 402 F.2d 676 (D.C. Cir. 1968). The earlier acquittal had been won at a trial based on a single information and thus in no way constituted an alternative or compromise verdict, *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960). Precisely the same issue resolved by the acquittal also was pivotal to the question of guilt at the second trial, *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961). Whether the Constitution demands the widest application of the doctrine of collateral estoppel to criminal proceedings need not now be determined. All that the Court need now decide is that the principle inherent in

the Fifth Amendment's ban on double jeopardy is a part of the due process of law which a state must accord to a criminal defendant and that this principle is transgressed when a defendant absolved by one jury is compelled to face another jury on the same issue of his involvement in a criminal incident.

2. *The Preclusive Effect of Prior Litigation on Subsequent Civil and Criminal Proceedings Has Consistently Been Recognized in Anglo-American Law.*

Since the origins of jurisprudence, the principle has existed that litigation in any form may have preclusive effects upon subsequent attempts at relitigation. *Hopkins* v. *Lee*, 19 U.S. (6 Wheat.) 109, 114 (1821). The principle of res judicata and collateral estoppel has long applied to both civil and criminal cases. *The Queen* v. *Miles*, 24 Q.B.D. 423, 431 (1890); *Rex* v. *Segan and Potter*, 90 Eng. Rep. 554 (K.B. 1696).

In the early days of this country, when statutory offenses were relatively few, the principle of collateral estoppel was encompassed within the broad concept of double jeopardy and required no separate articulation. Comment, 65 Yale Law Journal 339, 341-3 (1956). Moreover, all the states embraced the double jeopardy safeguard either by incorporating it in their constitutions or applying it as a common law principle. *Brock* v. *North Carolina*, 344 U.S. 424, 435 (1953). See Mo. State Constitution, Article One, Section 19. It was, of course, made applicable to the Federal Government through the Double Jeopardy clause of the Fifth Amendment.

As the number of statutory offenses has proliferated through codification and new statutes, instances of double

jeopardy "for the same offense" have become uncommon. Where prosecutions have offended the basic principle that a man should not be compelled to prove his innocence twice (*State* v. *Little*, 87 Ariz. 295, 350 P.2d 756, 764 [1960]), but where the Double Jeopardy clause was technically inapplicable, collateral estoppel has been applied to give modern significance to the protection against double jeopardy. *Coffey* v. *United States*, 116 U.S. 436, 443 (1886); see also *Frank* v. *Mangum*, 237 U.S. 309, 333-4 (1915).

In *United States* v. *Oppenheimer*, 242 U.S. 85 (1916), this Court relied upon the principle of collateral estoppel in federal trials to breath life into the Double Jeopardy clause of the Fifth Amendment. In applying the principle to criminal prosecutions Mr. Justice Holmes wrote:

> "The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice . . ., in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time." 242 U.S., at 88.

In *Sealfon* v. *United States*, 332 U.S. 575 (1948), a prior acquittal on a charge of conspiracy to defraud the United States was held to bar a second prosecution for aiding and abetting because the issue of agreement, which was crucial in the second prosecution, had been determined in the defendant's favor in the conspiracy trial. The Court cited *Oppenheimer* in applying collateral estoppel prin-

ciples and carefully evaluated the record of the prior proceeding to determine the considerations upon which the jury grounded its verdict.

Thus, the relevance of the collateral estoppel doctrine to the constitutional guarantee against double jeopardy has been tacitly recognized and in federal courts today it is settled that a defendant in a criminal case can assert collateral estoppel against the Government in the proper circumstances. *Watts* v. *United States,* 402 F.2d 676, 684 (D.C. Cir. 1968).

At least twenty-eight states either apply the "same transaction" test to define double jeopardy or have indicated concurrence with the federal view that collateral estoppel is available to criminal defendants in appropriate cases. None have unconditionally rejected the doctrine of collateral estoppel and only four have expressed reluctance to apply it in principle. Annot. 9 ALR3d 203, 229 (1966). See also *People* v. *Haran,* 27 Ill.2d 229, 188 N.E.2d 707, 709 (1963).

For example, in *Harris* v. *State,* 193 Ga. 109, 17 S.E.2d 573 (1941), the defendant was tried for robbery after his acquittal on a murder charge arising from the same transaction. Circumstances indicated that the first jury was not convinced he participated in the crime. The defendant's appeal was based on double jeopardy. His appeal was successful although the Georgia court recognized that the case did not involve former jeopardy in the usual sense, since the offenses were not identical as a matter of law. The court stated that the outcome was based on "the principle of res judicata which may be included in a plea under the broader doctrine of former jeopardy . . ." (17 S.E.2d at 579).

Here, as in *Harris* v. *State*, it might be said that double jeopardy does not exist in a technical sense. But it is clear that this is a proper case for the application of the doctrine of collateral estoppel by the Court to preserve the fundamental principle of justice underlying the Double Jeopardy clause.

The special circumstances that led the majority of this Court to conclude that the State was not estopped from a second trial in *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), are not involved here. The prosecution here could claim no surprise in the patent inability of its first trial witnesses to present convincing testimony identifying the Petitioner. In *Hoag* the collateral estoppel question was not decided because the majority of the Court felt bound by a determination of the state court that the prior acquittal might have turned on an issue other than the identity of the defendant. *State* v. *Hoag*, 21 N.J. 496, 122 A. 2d 628, 632-3 (1956). In this case the sole controverted issue at both trials was whether Bob Fred Ashe was one of the group of robbers. The district court characterized this as "the single issue in real contest" (A. 235).

It is noteworthy that in *State* v. *Cormier*, 46 N.J. 494, 218 A.2d 138 (1966), the New Jersey Supreme Court expressly overturned its earlier *Hoag* decision, stating:

> "The doctrine of collateral estoppel should not be applied grudgingly. The State's resources are sufficient to enable it to prepare and present its case thoroughly. It did that during the first trial. The fact that it then failed to persuade the jury . . . was no reason for allowing it to try again. The broadening policy considerations in favor of safeguarding individual rights of defendants and the need for conserving

public energies as well as public funds strongly suggest that where, as here, a jury has considered and rejected the State's contention in favor of the defendant's contention on the issue submitted as the crucial one, the matter should be permitted to rest in its entirety." 218 A.2d, at 146.

3. *Fundamental Justice Demands That the States Recognize the Preclusive Effect of a Prior Acquittal Based on a Key Issue of Fact.*

Under *Palko*, the Fourteenth Amendment selectively incorporates those Bill of Rights guarantees offering protection against practices "repugnant to the conscience of mankind." 302 U.S., at 323.

Unquestionably, the basic core of the protection against double jeopardy, represented by this case, is incorporated in the Fourteenth Amendment and binding upon the states. Fourteenth Amendment due process embodies those principles of justice that extend to "the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). Its principles are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). It involves not "merely personal standards but the impersonal standards of society . . ." *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 470 (1947).

Nothing is more fundamental to our system of criminal justice than the finality of a criminal acquittal. It may be that in some cases, such as *Palko*, the departure from standards normally followed imposes no "hardship so acute and shocking that our polity will not endure it." 302 U.S., at 328. But when the procedure followed by any state can

utterly ignore an acquittal and, for all practical purposes, reverse it, we breach the very foundation of Double Jeopardy and Due Process. Missouri's practice in this case provided the means to ignore the Petitioner's acquittal and bring him to trial on successive charges arising from the same event until a conviction was obtained.

Modern meaning for the protection against double jeopardy requires recognition of the applicability of collateral estoppel. The right to due process of law is violated when an individual is compelled to risk a second jury's determination of an issue previously resolved in his favor by a jury verdict.

The issue here is one of fundamental justice. By refusing to honor a clear determination by the Petitioner's first jury on the essential fact in controversy, the State subjected the Petitioner to an unfair procedure in the nature of double jeopardy and contrary to recognized considerations of basic fairness. Just as this procedure would violate the Fifth Amendment if practiced by the federal government, it transgresses the Fourteenth Amendment when practiced by a state.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed, and directions given to issue the Writ of Habeas Corpus.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1099

BOB FRED ASHE,
Petitioner,

vs.

HAROLD R. SWENSON, Warden,
Missouri State Penitentiary,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

In the opinion of the respondent, the question presented is: May the State try a defendant for robbery if the defendant has been acquitted previously on a charge of robbery, involving a different victim and different property and different issues, when each alleged robbery is part of the same episode?

STATEMENT

We adopt petitioner's statement of facts.

SUMMARY OF ARGUMENT

The petitioner was tried for two separate crimes; first a robbery of Knight, and, then, the robbery of Roberts. While both robberies are part of a single episode, the law of Missouri treats them as separate crimes for which there can be multiple punishments and multiple trials.

At the first trial, petitioner was acquitted for the robbery of Roberts. Missouri then tried and convicted him for the robbery of Knight.

The petitioner claims that he was twice put in jeopardy, contrary to the prohibition of the Fifth Amendment because of the acquittal at the first trial. It is his contention that even if the two robberies are separate offenses, the first jury based its verdict on the fact he was not present at the scene of the crimes. He argues the State is estopped from relitigating this issue which is essential if the conviction at the second trial is to stand.

It is the position of the State of Missouri that the double jeopardy protection of the Fifth Amendment does not apply to the factual situation presented in this case.

The Fifth Amendment prohibition against double jeopardy is codification of the common law. According to common law, petitioner would not have been twice placed in jeopardy. The common law would recognize the separateness of the two offenses.

The petitioner also asks this court invalidate his conviction on due process grounds. If the court were to do this, it would have to expressly overrule its prior holding in *Hoag* v. *New Jersey*, 356 U.S. 464. Recognizing that

at some point competitive trials could amount to a denial of due process, there is nothing in this case to show fundamental unfairness or an intention on the part of the State to harass or wear down the petitioner.

Petitioner also asks the court to apply the doctrine of collateral estoppel in criminal trials. We do not believe that collateral estoppel is applicable to the facts of this case.

It is not possible from the record to tell what facts the first jury found in the petitioner's favor. To apply collateral estoppel, the court would have to hypothesize that the first jury determines the "identity" issue, though that is only one of many other possible jury findings that would support the jury's decision to acquit. Even if collateral estoppel could be applied, this court has never held its application to be constitutionally mandatory. We would characterize collateral estoppel as a procedural rule that should not be elevated to the level of a fundamental constitutional right.

ARGUMENT

The State consistent with due process may try an individual who previously has been acquitted of the robbery of one victim for the robbery of another victim though both crimes are alleged to have occurred as part of one spisode.

A. A state may treat each robbery, though part of one episode, as a separate and independent crime; therefore, the defendant is not twice put in jeopardy for the same offense when he is tried at separate trials for each robbery.

1. When the petitioner was tried for the robbery of Roberts, this was not a trial for the robbery of Knight, the robbery of Knight being a separate offense.

Missouri may treat the robbery of one individual and the robbery of another individual as two independent criminal offenses notwithstanding the fact that both crimes took place as part of one episode. This view is justified because robbery in Missouri (Section 560.120, RSMo [1959]) has as an element an act that puts the victim in fear of violence against his person or an act that actually results in violence to the victim. Examining the interest protected by the statute, the nature of the harm, and the intent of the defendant required to commit the crime, it is reasonable to conclude when there are two victims, there are two crimes. This is what the Missouri Supreme Court has found the law of the state to be, *State* v. *Williams*, Mo., 263 S.W. 195, 197 (1924). The Missouri court reaffirmed this position when the petitioner appealed his conviction (A. 225).

In the present case the record clearly establishes that the State based its two separate robbery charges on testimony showing separate acts of violence against each victim (Donald Knight (A. 17), Ray Roberts (A. 136)) and

that individual property of each victim was taken from his person (Knight (A. 16, 17), Roberts (A. 136)).

It is the position of the State that because of the separateness of the offenses the defendant has not twice been put in jeopardy for the same offense. This Court has held that whether one act may constitute multiple offenses is not a constitutional question, *Ladner* v. *United States*, 358 U.S. 169, 173, 3 L.Ed.2d 199, 79 S.Ct. 209 (1958).

The wisdom of the determination of the Missouri Supreme Court that the robbery of two individuals constitutes two offenses cannot be challenged in this proceeding. The judgment of the highest state court is conclusive as to construction and application of state statutes and constitutions. *Senn* v. *Tile Layers Protective Union Local No. 5*, 301 U.S. 468, 481, 81 L.Ed. 1229 (1937).

2. The Fifth Amendment prohibition of twice putting an individual in jeopardy for the same offense represents the codification of the common law prohibition against double jeopardy, and is not applicable when there are multiple trials for multiple offenses.

The maxim "that no man is to be brought into jeopardy of his life more than once for the same offense" is an integral part of the common law. 4 Blackstone, *Commentaries on the Law of England* (1790). It appears that the intent of the drafters of the Fifth Amendment was to elevate this principle to an express individual right. History indicates that this provision, which had previously been embodied in several state constitutions, was not subject to a great deal of debate. Madison's original draft, providing that defendant could only be put on trial once, was modified to leave no doubt that a defendant could appeal a conviction just as he could a common law. The double jeopardy provision at least preserved the common law as it was then known. Justice Story was of this view:

> "* * * for the privilege thus secured is but a constitutional recognition of an old and well established maxim of the common law: and, therefore, we are to resort to the common law to ascertain its true use, interpretation, and limitations. * * *" *United States* v. *Gibert*, 2 Sumner 19, 38, 25 Fed. Cas. 1287, 1294 (No. 15204) (C. C. Mass. 1834).

We can find nothing to support the proposition that the Fifth Amendment expanded the common law on double jeopardy. (See, dissenting opinion of Justice Frankfurter in *Green* v. *United States*, 355 U.S. 184, at 200-204, 2 L.Ed.2d 199, 78 S.Ct. 221 (1957).)

Common law recognized the distinction between double jeopardy for the same offense and jeopardy for different offenses. For example, in *King* v. *Pedley*, 1 Leach 242, 168 Eng. Rep. 224 (1782), the defendant was acquitted of arson because the person named in the indictment as being in possession of the house burned did not in fact have possession. The court then ordered him tried on a charge of arson for burning the house of the actual occupier.

The leading expression of the common law position on what constitutes double jeopardy is as follows:

> "* * * Unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. * * *" *Rex* v. *Vandercomb and Abbot*, 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (1796).

This principle for determining if a defendant has been twice placed in jeopardy is often referred to as the "same evidence" test. While the *Vandercomb* case was decided shortly after the Fifth Amendment was ratified, it merely was articulating the law as it existed and was not promulgating a rule on a case of first impression.

This test has been followed by the United States Supreme Court, *Blockburger* v. *United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 312 (1931), *Ebeling* v. *Morgan*, 237 U.S. 625, 631, 632 (1915) (slashing separate mail bags constitutes separate offenses though part of one transaction).

Application of the test to the facts of this case is quite simple. At no time during the first trial where the petitioner was in jeopardy on charges of the robbery of Knight could he be said to be in jeopardy for the robbery of Roberts. This is true although evidence brought out at that trial might clearly show he was guilty of robbing Roberts. Therefore, when tried for the robbery of Roberts, he was in jeopardy for that offense for the first time. The evidence required at this trial to convict would not be the evidence required at the first trial.

The "same evidence" test has been widely employed. *Wharton's Crim. Law and Procedure*, §144, Anderson, Ed. (1957). Most states which have employed the "same evidence" test have constitutional provisions similar to the Fifth Amendment and even those that have no express provisions recognize double joepardy as a common law right, Wharton, §136. Though the Double Jeopardy clause of the Fifth Amendment just recently was held applicable to the states, *Benton* v. *Maryland*, 395 U.S. ....., 89 S.Ct. 2056 (1969), it would represent a radical departure from existing state practice to conclude that application of the "same evidence" test would be unconstitutional under the Fifth Amendment.

The prohibition of the Fifth Amendment is just as strong in preventing multiple punishment for the same offense as it is for multiple trials for the same offense. When a defendant is charged with committing two crimes, it would not be a violation of the Fifth Amendment to inflict

punishment for each crime he was found guilty of, *Gore* v. *United States*, 357 U.S. 386, 2 L.Ed.2d 1405, 78 S.Ct. 1280 (1958). It would be no more of a violation to try him for each alleged crime at a separate trial. *Ciucci* v. *Illinois*, 356 U.S. 571, 2 L.Ed.2d 983, 78 S.Ct. 839, reh. den. 357 U.S. 924, 2 L.Ed.2d 983, 78 S.Ct. 839 (1958).

It has occasionally been urged to this court that the Fifth Amendment ban on double jeopardy should be applied with narrow literalness. We do not argue the amendment should be so construed. In *Ex parte Lange*, 18 Wall. (U.S.) 163 (1874), the court held:

> "It is not necessary in this case to insist that other cases besides those involving life or limb are *positively* covered by the *language* of this [Fifth] amendment; * * *
>
> "It is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection. * * *" (Italics in original).

This is consistent with our position. At common law and in many states today, there are as many crimes as there are victims when the essence of an offense is a crime against the person. The fact that they are multiple offenses permits the State to try the defendant at separate trials without a defendant being twice put in jeopardy for the same offense. No right of the petitioner under the Fifth Amendment has been violated. *Bartkus* v. *Illinois*, 359 U.S. 121, 3 L.Ed.2d 684, 79 S.Ct. 676 (1959), reh. den. 360 U.S. 907, 3 L.Ed.2d 1258, 79 S.Ct. 1283.

B. The facts of this case do not show trial for the second robbery after acquittal for the first robbery to be fundamentally unfair.

We understand the petitioner to argue that if the double jeopardy clause of the Fifth Amendment does not

taint his conviction, that his conviction was nevertheless a violation of his right to due process. This court has already rejected such contention in a case virtually identical on its facts, *Hoag* v. *New Jersey*, 356 U.S. 464, Anno. 2 L.Ed.2d 913, 78 S.Ct. 829, reh. den. 357 U.S. 933, 2 L.Ed.2d 1375, 78 S.Ct. 1366 (1958).

The petitioner would have the court distinguish that case from the present controversy in that (1) the state court, in *State* v. *Hoag*, 21 N.J. 496, 122 A.2d 628 (1956), made a determination that the jury at *Hoag's* first trial did not necesarily acquit him because of the "identity" issue; and (2) the prosecution in *Hoag* was surprised at the first trial by the failure of state's witnesses to testify as expected.

We do not consider these two points to be distinguishing features. Looking at the first contention, the Supreme Court of New Jersey did not undertake an evaluation of the record and then conclude that it could not determine that the question of identity was not found in *Hoag's* favor. Rather the state court based its holding on the ground that no examination of the record in a criminal trial could establish the basis of a jury's verdict of "not guilty." The majority of the New Jersey Supreme Court then went on to state, 21 N.J. at 505, 122 A.2d at 632:

> "* * * Since it does not appear whether the acquittal was based on the determination of the question as to which the estoppel is sought in the second trial, the first verdict is not conclusive in the second trial. * * *"

A majority of this court accepted that conclusion of the New Jersey Supreme Court. It rejected the notion that it could by an examination of the record determine why the jury acquitted Hoag at the first trial. Mr. Justice Harlan wrote, 356 U.S. at 472:

> "* * * For we would have to embark on sheer speculation in order to decide that the jury's verdict at the earlier trial necessarily embraced a determination favorable to the petitioner on the issue of 'identity.'"

The Missouri Supreme Court took much the same position when the petitioner appealed. The tenor of its opinion was that it could not examine the trial record and determine what led the jury to decide as it did (A. 223). It might be argued that the Missouri Supreme Court went further and rejected entirely the concept of collateral estoppel as applied to criminal cases. This court does not need to decide whether the Missouri Supreme Court was correct in that position. All that it need hold is that when a jury is instructed that it must affirmatively determine several factors in order to return a verdict of guilty, then an appellate court need not speculate as to which of these factors the jury failed to find when it acquitted the defendant when faced with deciding whether the jury's decision to acquit may be used collaterally.

It is not uncommon for courts to refuse to permit a defendant to use a prior acquittal collaterally to establish an alibi at a subsequent trial. See, e.g., *People* v. *Ulrich*, 30 Ill.2d 94, 194 N.E.2d 180 (1963); *State* v. *Robinson*, 262 Minn. 79, 114 N.W.2d 737, cert. den. 83 S.Ct. 26, 371 U.S. 815, 9 L.Ed.2d 56 (1962); *State* v. *Barton*, 5 Wash. 234, 105 P.2d 63 (1940). If a court can examine the trial record and determine the underlying findings implicit in the verdict, juries are superfluous except as constitutional anachronisms.

Petitioner also contends that the failure of a witness to give excepted testimony justified the second trial in the *Hoag* case, but this factor is absent from the present case. How can a direct denial by a witness that *Hoag* was the robber be a justification of a new trial and the inability

of several witnesses to give positive testimony in the present case be held not to provide the same justification? Would Missouri have been better off if the witnesses had made positive denials that petitioner was involved? This is a distinction without a difference.

In the *Hoag* case, the witnesses who testified unfavorably at the first trial were not called at the second trial, 21 N.J. at 499, 122 A.2d at 630; yet there was no doubt that they were at the scene of the second robbery. Missouri called all the witnesses who were at the scene of the crime at the second trial who gave testimony at the first trial except for McClendon, one of the victims for whose robbery petitioner was not tried (A. 22-32). The failure of the state to call McClendon at the second trial was a tactical decision and cannot be said so fundamentally unfair as to be a denial of due process. His testimony at the first trial was equivocal—but only because of that factor can it be found helpful to the petitioner. It did not expressly exonerate the petitioner. There is nothing in the record to show that petitioner could not have called McClendon as his own witness if he thought his testimony would have been helpful.

We do not deny that some of the witnesses at the second trial gave more favorable testimony from the state's point of view than they gave at the first trial. No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial. There appears to be in the petitioner's argument suggestive undertones that the identification testimony at the second trial was manufactured. If he is arguing this, there is nothing in the record to support such a contention. The juries, of course, could hear any claims of inconsistencies and could give them such weight as they saw fit.

If, as respondent urges this court to hold, two trials are not *per se* a violation of due process, the facts of this case do establish that the two trials in this case represent an attempt on the state's part to wear out the accused with a multitude of trials. It is significant that when the petitioner appealed his conviction the Missouri Supreme Court recognized that multiple trials could be unconstitutional when it repeated the cautionary note of the New Jersey Superior Court:

> "* * * 'Assuredly our prosecutors are aware that the concept of double jeopardy is designed to prevent the government from unduly harassing an accused, and we are confident that they will not resort unfairly to multiple indictments and successive trials in order to accomplish indirectly that which the constitutional interdiction precludes.' " (A. 226).

In the present case, there was no delay or a denial of a speedy trial. The second trial ended within two months after the first one commenced (A. 1).

The petitioner knew of each charge against him before the first began. He made no effort to have the charges joined and tried together. It might be that he preferred not to risk the possibility that a single jury might find him guilty of each crime and subject him to a harsher penalty because of this.

The fact that the two verdicts are possibly inconsistent is not objectionable. This often happens when separate juries consider related fact situations. *Dunn* v. *United States*, 284 U.S. 390, 80 A.L.R. 161, 52 S.Ct. 189, 76 L.Ed. 356 (1932).

The conclusion is inescapable that to decide this case in favor of the petitioner the court would have to overrule its prior holding in *Hoag*. We find no new justification for such a course of action.

C. The doctrine of collateral estoppel does not apply to the facts of this case.

Petitioner has urged that the concept of double jeopardy incorporates the doctrine of collateral estoppel. We have previously argued that the Fifth Amendment prohibition is very specific and that in this case it has not been transgressed. But even taking a broad view of the Fifth Amendment and holding that collateral estoppel does apply, the facts of this case are such that collateral estoppel cannot be applied here.

The doctrine of collateral estoppel has often been stated in the following language.

> "(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. . . .
>
> "(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action." Restatement, Judgments, §68.

The doctrine requires that there be an express determination of specific facts and that these facts be essential to the actual judgment pleaded as an estoopel. Scott, *Collateral Estoppel by Judgment*, 56 Harvard Law Review 1 (1942). The one, and only, fact determined at Petitioner's first trial was that he did not rob Donald Knight. That fact does not preclude inquiry as to whether he robbed Roy Roberts. (The first jury informally added to the general verdict of not guilty the words " 'due to insufficient evidence' " (A. 90). This is not significant. It would have been implicit in the verdict had it not been added.)

Comment "p" and the illustration following it of the Restatement of Judgments, §68 demonstrate collateral estoppel does not operate in a case such as the present one, where the second trial is on a separate cause of action and the facts which the state is sought to be estopped on are merely "evidentiary." The comment and illustration state:

> "p. *Evidentiary facts.* The rules stated in this Section are applicable to the determination of facts in issue, but not to the determination of merely evidentiary facts even though the determination of the facts in issue is dependent upon the determination of the evidentiary facts.
>
> "*Illustration*:
>
> "14. A brings an action against B for breach of contract. B denies that he made the alleged contract. At the trial A testifies that on a certain day B signed the contract in New York. C testifies that he saw B in London on that day. Verdict and judgment for B. Thereafter A brings an action against B alleging that B assaulted A on the same day in New York. The judgment in the prior action does not preclude A from proving that B was in New York on the day in question."

The petitioner cites in his brief, at page 31, Judge Learned Hand's famous discussion of estoppel in *The Evergreens* v. *Nunan*, 141 F.2d 927 (2nd Cir. 1944). The petitioner argues that under the reasoning of that case Missouri should be estopped from litigating in the second trial for the issue of the accused's identity because that factor had been determined in the accused's favor at the first trial and was not a "meditate" question. We disagree. Identity was a "meditate" question at both trials. The "ultimate" question at each trial was, did the petitioner rob the particular victim charged by the State. Anno., 142 A.L.R. 1243, 152 A.L.R. 1243.

The majority decision in *Hoag*, supra at 470, found that collateral estoppel was not applicable on facts similar to this case. There is no reason why the same conclusion should not be reached in this case.

It is not necessary for the court wholly to accept with our characterization of the doctrine of collateral estoppel set forth, above, to find for the respondent. The court may instead hold the collateral estoppel as it pertained to this case as not constitutionally required.

D. Even if it could be said collateral estoppel may apply to this case, its application is not constitutionally mandatory.

No case has been found where this court has expressly stated that the doctrine of collateral estoppel is constitutionally mandatory in state criminal prosecutions. The petitioner argues that *Sealfon* v. *United States*, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948), represents an application of collateral estoppel in a criminal case. In that case the court did not deal with the constitutional question. The opinion, at 576, states a narrow issue decided—namely whether "an acquittal of conspiracy to defraud the United States precludes a subsequent prosecution for commission of the substantive offense on the facts herein involved."

Even if *Sealfon* is given a broad construction, it should not be held to rest on a constitutional foundation. It should be viewed as applicable only to federal criminal trials. The Supreme Court may judicially supervise the administration of criminal justice in the federal courts and provide guidance as to federal criminal procedure without elevating the policies that promulgate to the level of constitutional rights, *McNabb* v. *United States*, 318 U.S. 332, 340, 87 L.Ed. 819, 63 S.Ct. 608 (1942), reh. den. 319 U.S. 784, 87 L.Ed. 1727, 63 S.Ct. 1322.

Petitioner suggests in his brief, at page 33, that *United States* v. *Oppenheimer*, 242 U.S. 85 (1916), this court relied upon the principle of collateral estoppel in federal trials to breathe life into the double jeopardy clause of the Fifth Amendment. The facts of that case were significantly different than those of the present case. *Oppenheimer* had previously pleaded the statute of limitations barred the indictment, and, consequently, he was acquitted. Another case, not involving *Oppenheimer*, established that the statute of limitations did not apply. When the government then attempted to reprosecute *Oppenheimer*, the United States Supreme Court held that the first acquittal was a bar to reprosecution. The feature distinguishing that case from the present one was that both indictments in *Oppenheimer* were for the same offense, while the petitioner in this case was tried for separate offenses. The holding in *Oppenheimer* is not based on collateral estoppel but *res judicata*.

It has been suggested that collateral estoppel as it is applied in civil cases should be applied in criminal cases. One reason that might be advanced in opposition to this view is that in civil cases, through discovery and in pleading, the parties narrow the issues involved so that a jury verdict examined in light of the discovery and pleadings can be held to support certain findings of fact—though these findings are not an explicit part of the verdict. In a criminal case, discovery does not operate against the defendant and he cannot be required to plead specifically in reply to the State's allegations. It is not unreasonable or fundamentally unfair that a state not be precluded from establishing, at a second trial for a separate offense, facts the first jury may not have (but could have) found.

In a civil trial both parties would be bound by the facts established at a previous trial. In a criminal trial the State has to prove anew each element of the case to the

satisfaction of the jury. The mutuality of the estoppel is, therefore, lacking in a criminal trial. *Rouse* v. *State*, 202 Md. 481, 97 A.2d 285 (1953), cert. den. 74 S.Ct. 104, 346 U.S. 865, 98 L.Ed. 376.

Collateral estoppel should be viewed as a procedural device and not made constitutionally mandatory on the states. See *Abbate* v. *U. S.*, 359 U.S. 187, 200, N. 4, 3 L.Ed.2d 729, 79 S.Ct. 666 (Brennan, J., Sep. Op.).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below, denying the Writ of Habeas Corpus, should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 57

BOB FRED ASHE,

Petitioner,

—v.—

HAROLD R. SWENSON, Warden
Missouri State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

1. Contrary to the implications in Respondent's brief (R. Br. pp. 4-8), Petitioner's plea is not based upon an allegation that the State of Missouri cannot consistent with due process prosecute at separate trials separate criminal offenses arising out of a single criminal episode. As stated in Petitioner's main brief (pp. 19, 21), the Court, in order to provide Petitioner with the constitutional protections implicit in the Due Process Clause, need not determine that the robbery of multiple victims involves a single offense rather than multiple offenses. This case presents a more narrow question. The State violated Petitioner's rights

under the Due Process Clause of the Fourteenth Amendment by placing him a second time in jeopardy after he had been acquitted on the key issue of his participation in the robbery of Don Knight, Ray Roberts and the four other victims. Whatever may be the circumstances under which multiple prosecutions may be brought and multiple punishment imposed for the commission of a single criminal transaction, due process is clearly denied when a defendant is tried again after a jury has acquitted him on the one contested element common and cardinal to each of the multiple offenses with which he was charged. By doing so in this case, Missouri forced the Petitioner to run the gauntlet twice. This clearly infringes the principles inherent in the prohibition against double jeopardy and violates the Due Process Clause of the Fourteenth Amendment.

2. Respondent argues that the State was not estopped from subsequently trying Petitioner for the robbery of Roberts because issues other than Petitioner's identity may have been dispositive in the prior prosecution for robbing Knight (R. Br. pp. 9-10). This Court in *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), declined to decide whether collateral estoppel applied to a subsequent prosecution for robbery after an acquittal in a prior trial for a separate offense on the ground that the state supreme court had ruled that "the trial of the first three indictments involved several questions, not just [petitioner's] identity, and there is no way of knowing upon which question the jury's verdict turned" (356 U.S. at 471). Here the Missouri Supreme Court similarly sought to find issues other than the Petitioner's identity that might have been controlling in the trial of Knight. The court stated, "In the trial where Knight was the person alleged to have been robbed, the jury may

not have believed beyond a reasonable doubt that any property was taken from Knight. In the case now before us, the jury found that property was taken from Roberts" (A. 225-226).

It is clear from the record, however, that the sole controverted issue in the first prosecution was not whether Knight had been robbed but by whom. It was directly established that Knight was robbed of his money, his watch and his billfold (A. 17). The fact of Knight's loss was not contested. Furthermore, three of the other victims each gave testimony sufficient to establish all of the basic elements of the crime.

Farfetched conjecture as to possible issues determinative of the jury's verdict in the first trial other than Petitioner's identity should not, through citation to *Hoag,* be allowed to cut off consideration of Petitioner's constitutional rights. The court of appeals also speculated that the jury may have based its verdict on various issues other than identity (A. 244-245). However, the realistic analysis of the facts by the federal district court showed that no speculation is justified as to the controlling issue involved in the jury's acquittal of Petitioner. The court said (A. 235):

> "An examination of the transcript of both trials shows that in both the single issue in real contest, as distinguished from the issues that may be said to have been in technical dispute, was the question of whether petitioner was or was not present at the time the money was taken from the poker table and the other property taken from persons of the respective poker players."

Further, Respondent's brief recognizes the State's awareness that Petitioner's acquittal in the trial for robbing

Knight resulted from lack of adequate identification. Respondent first observes that "The failure of the state to call McClendon at the second trial was a tactical decision and cannot be said so fundamentally unfair as to be a denial of due process" (R. Br. p. 11). McClendon, who had known Petitioner for twenty years and was his uncle by marriage, had positively stated at the first trial that the three actual participants in the holdup were Johnson, Larson, and Brown (A. 30-32). Respondent refers expressly to the attempt of the State in the second trial to improve the testimony and correct the deficiencies of proof on the issue of identification (R. Br. p. 11):

> "We do not deny that some of the witnesses at the second trial gave more favorable testimony from the state's point of view than they gave at the first trial. No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation *in light of the turn of events at the first trial.*" (Emphasis added.)

In our main brief (pp. 13-14) we have shown in detail the manner in which the state prosecutor refined the testimony of his witnesses to repair the only weak point in his case—placing Petitioner at the scene of the crime.

There is no merit to the argument of Respondent that a court cannot examine the trial record and determine the underlying findings implicit in a jury's verdict (R. Br. p. 10). As the Court stated in *Hoag,* "It is of course true that when necessary to a proper determination of a claimed denial of constitutional rights this Court will examine the record in a state criminal trial and is not foreclosed by the

conclusion of the state court." (*Hoag* v. *New Jersey, supra,* 356 U.S. at 471.) Furthermore, as in *Sealfon* v. *United States,* 332 U.S. 575 (1948) and the other cases cited in our main brief (pp. 25-27), it is not unusual for courts to evaluate the trial record to determine the particular issue involved in a jury verdict of acquittal in order to protect a defendant from successive litigation of an issue determined in his favor.

Petitioner contends that under the circumstances of this case the Missouri court was in error in not examining the record and determining that collateral estoppel must apply to protect Petitioner from multiple trials on the same issue.

3. Respondent argues that even if the doctrine of collateral estoppel applies in this case, its application by the State of Missouri is not constitutionally mandatory (R. Br. pp. 15-17). In our main brief (pp. 24-28) we have shown that, in cases where the Double Jeopardy Clause was technically inapplicable, collateral estoppel has been applied by both federal and state courts to preserve the fundamental principle of justice that a man should not be compelled to prove his innocence twice.

In the present case collateral estoppel becomes essential to provide the Petitioner with those fundamental rights which are inherent in the constitutional guarantee against double jeopardy. Under the theory of the State of Missouri the contemporaneous robbery of six victims constitutes six different offenses, and it could proceed to try Petitioner separately for each offense until it obtained a conviction. This view would permit a sixth trial notwithstanding the fact that Petitioner had been acquitted in five successive trials. A second trial after acquittal on the key issue of

identity is equally a transgression of the requirements of fair procedure guaranteed by the Due Process Clause of the Fourteenth Amendment.

As set forth in the preceding pages, in this case after the Petitioner was acquitted of robbing Knight on the ground of "insufficient evidence," he was then put to trial for the robbery of Roberts. This enabled the prosecutor "to refine his presentation in light of the turn of events at the first trial" and to see if he could not do better the second time in adducing testimony placing Petitioner on the scene. This offends the basic principle of the Fifth Amendment protection against double jeopardy.

It is deeply rooted in the philosophy underlying the Double Jeopardy Clause that a verdict of acquittal is final and ends a defendant's jeopardy. Furthermore, "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U.S. 184, 187-188 (1957).

There is no longer any doubt that the Double Jeopardy Clause of the Fifth Amendment is binding on the states in every respect by its incorporation into the Due Process Clause of the Fourteenth Amendment. Since the filing of Petitioner's main brief, the Court in *Benton* v. *Maryland,* 395 U.S. 784 (1969), moved far beyond the "selective incorporation" standard laid down in *Palko* v. *Connecticut,* 302 U.S. 319 (1937). Under *Palko* the states were required

to apply the Fifth Amendment protection against double jeopardy only when the kind of double jeopardy to which a defendant was subjected imposed a "hardship so acute and shocking that our polity will not endure it," and where such double jeopardy violated those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 302 U.S. 319, 328. In *Benton* the Court, in overruling *Palko,* held that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment" (395 U.S. at 794), and "Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice'." (395 U.S. at 796.)

However, as pointed out in our brief on the merits (pp. 18-19), even under the standards of *Palko,* the action of the State in this case clearly subjected Petitioner to an unfair burden inconsistent with the constitutional due process guarantee and violated basic principles of liberty and justice.

The decision in *Benton* underscores the deprivation of the constitutional rights of Petitioner by the State of Missouri. Moreover, it emphasizes the necessity of applying the concept of collateral estoppel as a constitutional safeguard to prevent the states from circumventing the double jeopardy protection of the Fifth Amendment through distinctions in defining offenses or by other technicalities. This is abundantly illustrated by the present case where Missouri's practice provided the means by which the Petitioner's acquittal could be ignored and he could be brought to trial on successive charges arising from the same event until a conviction was obtained.

Petitioner believes it is clear that collateral estoppel becomes essential to the meaningful application of the protection against double jeopardy and must be accorded constitutional status in this case in order to preserve the fundamental principles of justice underlying the Fifth and Fourteenth Amendments.

Conclusion

For these reasons and those set out in Petitioner's main brief, it is respectfully submitted that the judgment of the court below should be reversed, and directions given to issue the Writ of Habeas Corpus.

Respectfully submitted,

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 57.—October Term, 1969

Bob Fred Ashe, Petitioner, v. Harold R. Swenson, Warden. } On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[April 6, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

In *Benton* v. *Maryland*, 395 U. S. 784, the Court held that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. The question in this case is whether the State of Missouri violated that guarantee when it prosecuted the petitioner a second time for armed robbery in the circumstances here presented.[1]

Sometime in the early hours of the morning of January 10, 1960, six men were engaged in a poker game in the basement of the home of John Gladson at Lee's Summit, Missouri. Suddenly three or four masked men, armed with a shotgun and pistols, broke into the basement and robbed each of the poker players of money and various articles of personal property. The robbers—and it has never been clear whether there were three or four of them—then fled in a car belonging to one of the victims of the robbery. Shortly thereafter the stolen car was discovered in a field, and later that

[1] There can be no doubt of the "retroactivity" of the Court's decision in *Benton* v. *Maryland*. In *North Carolina* v. *Pearce*, 395 U. S. 711, decided the same day as *Benton*, the Court unanimously accorded fully "retroactive" effect to the *Benton* doctrine.

morning three men were arrested by a state trooper while they were walking on a highway not far from where the abandoned car had been found. The petitioner was arrested by another officer some distance away.

The four were subsequently charged with seven separate offenses—the armed robbery of each of the six poker players and the theft of the car. In May 1960 the petitioner went to trial on the charge of robbing Donald Knight, one of the participants in the poker game. At the trial the State called Knight and three of his fellow poker players as prosecution witnesses. Each of them described the circumstances of the holdup and itemized his own individual losses. The proof that an armed robbery had occurred and that personal property had been taken from Knight as well as from each of the others was unassailable. The testimony of the four victims in this regard was consistent both internally and with that of the others. But the State's evidence that the petitioner had been one of the robbers was weak. Two of the witnesses thought that there had been only three robbers altogether, and could not identify the petitioner as one of them. Another of the victims, who was the petitioner's uncle by marriage, said that at the "patrol station" he had positively identified each of the other three men accused of the holdup, but could say only that the petitioner's voice "sounded very much like" that of one of the robbers. The fourth participant in the poker game did identify the petitioner, but only by his "size and height, and his actions."

The cross-examination of these witnesses was brief, and it was aimed primarily at exposing the weakness of their identification testimony. Defense counsel made no attempt to question their testimony regarding the holdup itself or their claims as to their losses. Knight testified without contradiction that the robbers had stolen from him his watch, $250 in cash, and about $500

in checks. His billfold, which had been found by the police in the possession of one of the three other men accused of the robbery, was admitted in evidence. The defense offered no testimony and waived final argument.

The trial judge instructed the jury that if it found that the petitioner was one of the participants in the armed robbery, the theft of "any money" from Knight would sustain a conviction.[2] He also instructed the jury that if the petitioner was one of the robbers, he was guilty under the law even if he had not personally robbed Knight.[3] The jury—though not instructed to elaborate upon its verdict—found the petitioner "not guilty due to insufficient evidence."

Six weeks later the petitioner was brought to trial again, this time for the robbery of another participant

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[2] "The Court instructs the jury that if you believe and find from the evidence in this case, beyond a reasonable doubt, that at the County of Jackson and State of Missouri, on the 10th day of January, 1960, the defendant herein, BOB FRED ASHE, alias BOBBY FRED ASHE, either alone or knowingly acting in concert with others, did then and there with force and arms in and upon one Don Knight, unlawfully and feloniously make an assault and took and carried away any money from his person or in his presence and against his will, by force and violence to his person, or by putting him in fear of some immediate injury to his person, with felonious intent to convert the same to his own use, without any honest claim to said money on the part of the defendant and with intent to permanently deprive the said Don Knight of his ownership and without the consent of the said Don Knight, if such be your finding, then you will find the defendant guilty of Robbery, First Degree, and so find in your verdict."

[3] "The Court instructs the jury that all persons are equally guilty who act together with a common intent in the commission of a crime, and a crime so committed by two or more persons jointly is the act of all and of each one so acting.

"The Court instructs the jury that when two or more persons knowingly act together in the commission of an unlawful act or purpose, then whatever either does in furtherance of such unlawful act or purpose is in law the act and deed of each of such persons."

in the poker game, a man named Roberts. The petitioner filed a motion to dismiss, based on his previous acquittal. The motion was overruled, and the second trial began. The witnesses were for the most part the same, though this time their testimony was substantially stronger on the issue of the petitioner's identity. For example, two witnesses who at the first trial had been wholly unable to identify the petitioner as one of the robbers, now testified that his features, size, and mannerisms matched those of one of their assailants. Another witness who before had identified the petitioner only by his size and actions now also remembered him by the unusual sound of his voice. The State further refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative. The case went to the jury on instructions virtually identical to those given at the first trial. This time the jury found the petitioner guilty, and he was sentenced to a 35-year term in the state penitentiary.

The Supreme Court of Missouri affirmed the conviction, holding that the "plea of former jeopardy must be denied." *State* v. *Ashe*, 350 S. W. 2d 768, at 771. A collateral attack upon the conviction in the state courts four years later was also unsuccessful. *State* v. *Ashe*, 403 S. W. 2d 589. The petitioner then brought the present habeas corpus proceeding in the United States District Court for the Western District of Missouri, claiming that the second prosecution had violated his right not to be twice put in jeopardy. Considering itself bound by this court's decision in *Hoag* v. *New Jersey*, 356 U. S. 464, the District Court denied the writ, although apparently finding merit in the petitioner's claim.[4] The Court

[4] "However persuasive the dissenting opinions in the *Hoag* case may be, it is the duty of this Court to follow the law as stated by the Supreme Court of the United States until it expresses a contrary

of Appeals for the Eighth Circuit affirmed, also upon the authority of *Hoag* v. *New Jersey, supra.*[5] We granted certiorari to consider the important constitutional question this case presents. 393 U. S. 1115.

As the District Court and the Court of Appeals correctly noted, the operative facts here are virtually identical to those of *Hoag* v. *New Jersey, supra.* In that case the defendant was tried for the armed robbery of three men who, along with others, had been held up in a tavern. The proof of the robbery was clear, but the evidence identifying the defendant as one of the robbers was weak, and the defendant interposed an alibi defense. The jury brought in a verdict of not guilty The defendant was then brought to trial again, on an indictment charging the robbery of a fourth victim of the tavern holdup. This time the jury found him guilty After appeals in the state courts proved unsuccessful, Hoag brought his case here.

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view. Certainly the factual circumstances of this case provide an excellent opportunity for reexamination of the questions presented. An examination of the transcript of both trials shows that in both the single issue in real contest, as distinguished from the issues that may be said to have been in technical dispute, was the question of whether petitioner was or was not present at the time the money was taken from the poker table and the other property taken from persons of the respective poker players." *Ashe* v. *Swenson,* 289 F Supp. 871, 873.

[5] "It usually is difficult for a lower federal court to forecast with assurance a Supreme Court decision as to the continuing validity of a holding of a decade ago by a Court then divided as closely as possible. This is particularly so when the decision is in the rapidly developing and sensitive area of the criminal law and the Fourteenth Amendment-Bill of Rights relationship. We feel, however, that our task is not to forecast but to follow those dictates, despite their closeness of decision, which at this moment in time are on the books and for us to read. . . ." *Ashe* v. *Swenson,* 399 F. 2d 40, 46.

Viewing the question presented solely in terms of Fourteenth Amendment due process—whether the course that New Jersey had pursued had "led to fundamental unfairness," 356 U. S., at 467—this Court declined to reverse the judgment of conviction, because "in the circumstances shown by this record, we cannot say that petitioner's later prosecution and conviction violated due process."[6] The Court found it unnecessary to decide whether "collateral estoppel"—the principle that bars relitigation between the same parties of issues actually determined at a previous trial—is a due process requirement in a state criminal trial, since it accepted New Jersey's determination that the petitioner's previous acquittal did not in any event give rise to such an estoppel. 356 U. S., at 471. And in the view the Court took of the issues presented, it did not, of course, even approach consideration of whether collateral estoppel is an ingredient of the Fifth Amendment guarantee against double jeopardy.

The doctrine of *Benton* v. *Maryland*, 395 U. S. 784, puts the issues in the present case in a perspective quite different from that in which the issues were perceived in *Hoag* v. *New Jersey, supra*. The question is no longer

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[6] The particular "circumstance" most relied upon by the Court was "the unexpected failure of four of the State's witnesses at the earlier trial to identify petitioner, after two of these witnesses had previously identified him in the course of the police investigation. Indeed, after the second of the two witnesses failed to identify petitioner, the State pleaded surprise and attempted to impeach his testimony. We cannot say that, after such an unexpected turn of events, the State's decision to try petitioner for the Yager robbery was so arbitrary or lacking in justification that it amounted to a denial of those concepts constituting 'the very essence of a scheme of ordered justice, which is due process.'" 356 U. S., at 469–470. In the case now before us, by contrast, there is no claim of any "unexpected turn of events" at the first trial, unless the jury verdict of acquittal be so characterized.

whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy. And if collateral estoppel is embodied in that guarantee, then its applicability in a particular case is no longer a matter to be left for state court determination within the broad bounds of "fundamental fairness," but a matter of constitutional fact we must decide through an examination of the entire record. Cf. *New York Times* v. *Sullivan*, 376 U. S. 254, 285; *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Watts* v. *Indiana*, 338 U. S. 49, 51; *Chambers* v. *Florida*, 309 U. S. 227, 229; *Norris* v. *Alabama*, 294 U. S. 587, 590.

"Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States* v. *Oppenheimer*, 242 U. S. 85. As Mr. Justice Holmes put the matter in that case, "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." 242 U. S., at 87.[7] As a rule of federal law, therefore, "[i]t is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or

[7] See also *Coffey* v. *United States*, 116 U. S. 436, 442–443; *Frank* v. *Mangum*, 237 U. S. 309, 333–334; *Sealfon* v. *United States*, 332 U. S. 575; *United States* v. *DeAngelo*, 138 F. 2d 466; *United States* v. *Curzio*, 170 F. 2d 354; *Yawn* v. *United States*, 244 F. 2d 235; *United States* v. *Cowart*, 118 F. Supp. 903.

because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain." *United States* v. *Kramer*, 289 F. 2d 909, at 913.

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[8] The inquiry "must be set in a practical frame, and viewed with an eye to all the circumstances of the proceedings." *Sealfon* v. *United States*, 332 U. S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.[9]

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[8] Mayers and Yarborough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, at 38-39. See *Yawn* v. *United States*, *supra*; *United States* v. *DeAngelo*, *supra*.

[9] "If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering. . . . In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction." Mayers and Yarborough, *loc. cit.*, *supra*,

Straightforward application of the federal rule to the present case can lead to but one conclusion. For the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.

The ultimate question to be determined, then, in the light of *Benton* v. *Maryland, supra,* is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is.[10] For whatever else that

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at 38. See generally, Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317. See also, Comment, Twice in Jeopardy, 75 Yale L. J. 262; Hunvald, Criminal Law in Missouri, 25 Mo. L. Rev. 369, 369–375; Comment, Double Jeopardy and Collateral Estoppel in Crimes Arising From the Same Transaction, 24 Mo. L. Rev. 513; McLaren, The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases, 10 Wash. L. Rev. 198.

[10] It is true, as this Court said in *Hoag* v. *New Jersey, supra,* that we have never squarely held collateral estoppel to be a constitutional requirement. Until perhaps a century ago, few situations arose calling for its application. For at common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense. See Comment, Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 Yale L. J. 339, at 342. In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction. See Note, 57 Yale L. J. 132, 133. As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became

constitutional guarantee may embrace, *North Carolina* v. *Pearce*, 395 U. S. 711, 717, it surely protects a man who has been acquitted from having to "run the gantlet" a second time. *Green* v. *United States*, 355 U. S. 184, 190.

The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.

After the first jury had acquitted the petitioner of robbing Knight, Missouri could certainly not have brought him to trial again upon that charge. Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers.

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far more pronounced. Comment, 75 Yale L. J. 262, 279–280; Note, 7 Brooklyn L. Rev. 79, 82. The federal courts soon recognized the need to prevent such abuses through the doctrine of collateral estoppel, and it became a safeguard firmly embedded in federal law. See n. 6, *supra*. Whether its basis was a constitutional one was a question of no more than academic concern until this Court's decision in *Benton* v. *Maryland*, *supra*.

In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge, and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." But this is precisely what the constitutional guarantee forbids.

The judgment is reversed, and the case is remanded to the Court of Appeals for the Eighth Circuit for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 57.—October Term, 1969

Bob Fred Ashe, Petitioner,
v.
Harold R. Swenson, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[April 6, 1970]

Mr. Justice Black, concurring.

I join in the opinion of the Court although I must reject any implication in that opinion that the so-called due process test of "fundamental fairness" might have been appropriate as a constitutional standard at some point in the past or might have a continuing relevancy today in some areas of constitutional law. In my view it is a wholly fallacious idea that a judge's sense of what is fundamentally "fair" or "unfair" should ever serve as a substitute for the explicit, written provisions of our Bill of Rights. One of these provisions is the Fifth Amendment's prohibition against putting a man twice in jeopardy. On several occasions I have stated my view that the Double Jeopardy Clause bars a State or the Federal Government or the two together from subjecting a defendant to the hazards of trial and possible conviction more than once for the same alleged offense. *Bartkus* v. *Illinois*, 359 U. S. 121, 150 (1959) (dissenting opinion); *Abbate* v. *United States*, 359 U. S. 187, 201 (1959) (dissenting opinion); *Cuicci* v. *Illinois*, 356 U. S. 571, 575 (1958) (dissenting opinion); *Green* v. *United States*, 355 U. S. 184 (1957). The opinion of the Court in the case today amply demonstrates that the doctrine of collateral estoppel is a basic and essential part of the Constitution's prohibition against double jeopardy. Accordingly, for the reasons stated in the Court's opinion I fully agree that petitioner's conviction must be reversed.

SUPREME COURT OF THE UNITED STATES

No 57.—October Term, 1969

Bob Fred Ashe, Petitioner,
v.
Harold R. Swenson, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[April 6, 1970]

Mr. Justice Harlan, concurring.

If I were to judge this case under the traditional standards of Fourteenth Amendment due process, I would adhere to the decision in *Hoag* v. *New Jersey*, 356 U. S. 464 (1958), believing that regardless of the reach of the federal rule of collateral estoppel, it would have been open to a state court to treat the issue differently. However, having acceded in *North Carolina* v. *Pearce*, 395 U. S. 711, 744 (1969), to the decision in *Benton* v. *Maryland*, 395 U. S. 784 (1969), which, over my dissent, held that the Fourteenth Amendment imposes on the States the standards of the Double Jeopardy Clause of the Fifth Amendment, I am satisfied that on this present record Ashe's acquittal in the first trial brought double jeopardy standards into play. Hence, I join the Court's opinion. In doing so I wish to make explicit my understanding that the Court's opinion in no way intimates that the Double Jeopardy Clause embraces to any degree the "same transaction" concept reflected in the concurring opinion of my Brother Brennan.

SUPREME COURT OF THE UNITED STATES

No. 57.—October Term, 1969

Bob Fred Ashe, Petitioner,
v.
Harold R. Swenson, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[April 6, 1970]

Mr. Justice Brennan, whom Mr. Justice Douglas and Mr. Justice Marshall join, concurring.

I agree that the Double Jeopardy Clause incorporates collateral estoppel as a constitutional requirement and therefore join the Court's opinion. However, even if the rule of collateral estoppel had been inapplicable to the facts of this case, it is my view that the Double Jeopardy Clause nevertheless bars the prosecution of petitioner a second time for armed robbery. The two prosecutions, the first for the robbery of Knight and the second for the robbery of Roberts, grew out of one criminal episode, and therefore I think it clear on the facts of this case that the Double Jeopardy Clause prohibited Missouri from prosecuting petitioner for each robbery at a different trial. *Abbate* v. *United States*, 359 U. S. 187, 196–201 (1959) (separate opinion).

My conclusion is not precluded by the Court's decision in *Hoag* v. *New Jersey*, 356 U. S. 464 (1958), although the basic fact situation there was identical to that in this case. Three armed men entered a tavern and robbed five customers. Hoag was tried and acquitted under indictments for robbing three of the customers. He was then brought to trial under a fourth indictment, the same as the first three in all respects except that it named a fourth customer as the victim. This time

Hoag was convicted. The New Jersey courts, in rejecting Hoag's double jeopardy claim, construed the applicable New Jersey statute as making each of the four robberies, although taking place on the same occasion, a separate offense. This construction was consistent with the state courts' view that a claim of double jeopardy cannot be upheld unless the same evidence necessary to sustain a second indictment would have been sufficient to secure a conviction on the first. The issues differed only in the identifications of the victims and the property taken from each; otherwise the State's evidence covered the same ground at both trials. This Court stated that it was unable to hold that the Due Process Clause of the Fourteenth Amendment "always prevents a State from allowing different offenses arising out of the same act or transaction to be prosecuted separately, as New Jersey has done. For it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice." 356 U. S., at 468. But in the present case Missouri did not have "the widest latitude" because *Benton* v. *Maryland*, 395 U. S. 784 (1969), decided after *Hoag*, held that the Fifth Amendment guarantee that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" is enforceable against the States, and *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), accorded fully retroactive effect to that holding. This means, under our decisions, that federal standards as to what constitutes "same offence" apply alike to federal and state proceedings; it would be incongruous to have different standards determine the validity of a claim of double jeopardy depending on whether the claim was asserted in a state or federal court. Cf. *Malloy* v. *Hogan*, 378 U. S. 1, 11 (1964).

The Double Jeopardy Clause is a guarantee "that the State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States*, 355 U. S. 184, 187 (1957). This guarantee is expressed as a prohibition against multiple prosecutions for the "same offence." Although the phrase "same offence" appeared in most of the early common-law articulations of the double jeopardy principle,[1] questions of its precise meaning rarely arose prior to the 18th century, and by the time the Bill of Rights was adopted it had not been authoritatively defined.[2]

When the common law did finally attempt a definition, in *The King* v. *Vandercomb & Abbott*, 2 Leach 708, 720, 168 E. R. 455, 461 (Ex. 1796), it adopted the "same evidence" test, which provided little protection from multiple prosecution:

> "unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."

The "same evidence" test of "same offence" was soon followed by a majority of American jurisdictions, but its deficiencies are obvious. It does not enforce but virtually annuls the constitutional guarantee. For example, where a single criminal episode involves several

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[1] See, *e. g.*, Vaux's Case, 4 Co. Rep. 44a, 45a, 76 E. R. 992, 993 (K. B. 1591); 2 Hale, Pleas of the Crown **240–255 ("same felony"); 2 Hawkins, Pleas of the Crown 515 (8th ed. 1824); 4 Blackstone, Commentaries *335.

[2] See generally J. Sigler, Double Jeopardy 1–37 (Cornell University Press 1969).

victims, under the "same evidence" test a separate prosecution may be brought as to each. *E. g., State* v. *Hoag*, 21 N. J. 496, 122 A. 2d 628 (1956), aff'd, 356 U. S. 464 (1958). The "same evidence" test permits multiple prosecutions where a single transaction is divisible into chronologically discrete crimes. *E. g., Johnson* v. *Commonwealth*, 201 Ky. 314, 256 S. W. 388 (1923) (each of 75 poker hands a separate "offense"). Even a single criminal act may lead to multiple prosecutions if it is viewed from the perspectives of different statutes. *E. g., State* v. *Elder*, 65 Ind. 282 (1879). Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion concerning the initiation and scope of a criminal prosecution,[3] the potentialities for abuse inherent in the "same evidence" test are simply intolerable.[4]

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[3] See Baker, The Prosecutor—Initiation of Prosecution, 23 J. Crim. L. 770 (1933); Baker & DeLong, The Prosecuting Attorney—Powers and Duties in Criminal Prosecution, 24 J. Crim. L. & C. 1025 (1934); Kaplan, The Prosecutorial Discretion—A Comment, 60 Nw. U. L. Rev. 174 (1965); Note, Prosecutor's Discretion, 103 U. Pa. L. Rev. 1057 (1955); Note, Discretion Exercised by Montana County Attorneys in Criminal Prosecutions, 28 Montana L. Rev. 41 (1966); Note, Prosecutorial Discretion in the Initiation of Criminal Complaints, 42 So. Cal. L. Rev. 519 (1969).

[4] Several subsidiary rules have been developed in attempts to eliminate anomalies resulting from the "same evidence" test. Thus, where one offense is included in another, prosecution for one bars reprosecution for the other even though the evidence necessary to prove the two offenses is different. Similarly, doctrines of *res judicata* and collateral estoppel have provided some, though not very much, relief from the extreme permissiveness of the test. See generally Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale L. J. 513 (1949). Numerous practical exceptions to the test are discussed in Horack, The Multiple Consequences of a Single

The "same evidence" test is not constitutionally required. It was first expounded *after* the adoption of the Fifth Amendment, and, as shown in *Abbate* v. *United States, supra,* at 197–198 and n. 2, has never been squarely held by this Court to be the required construction of the constitutional phrase "same offence" in a case involving multiple trials; indeed, in that context it has been rejected. See *In re Nielson,* 131 U. S. 176 (1889), discussed in *Abbate* v. *United States, supra,* at 201. The "same evidence" test may once have been defensible at English common law, which, for reasons peculiar to English criminal procedure, severely restricted the power of prosecutors to combine several charges in a single trial.[5] In vivid contrast, American criminal procedure generally allows a prosecutor freedom, subject to judicial control, to prosecute a person at one trial for all the crimes arising out of a single criminal transaction.[6]

In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances,[7] to

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Criminal Act, 21 Minn. L. Rev. 805 (1937). So many exceptions to the "same evidence" rule have been found necessary that it is hardly a rule at all; yet the numerous exceptions have not succeeded in wholly preventing prosecutorial abuse.

[5] As Mr. Justice Frankfurter has said, "Since the prohibition of the Constitution against Double Jeopardy is derived from history, its significance and scope must be determined 'not simply by taking the words and a dictionary, but by considering [its] origins and the line of [its] . . . growth.'" *Green* v. *United States, supra,* at 199 (dissenting opinion). The relation between the history of English criminal procedure and the history of the common law of double jeopardy is comprehensively examined in M. L. Friedland, "Double Jeopardy" (Clarendon Press—Oxford 1969). See in particular pp. 161–194.

[6] See, *e. g.,* F. R. Cr. P. 8, 13, 14; Ill. Rev. Stat. c. 38 §§ 3–3 (1967); Annot., 59 A. L. R. 2d 841 (1958).

[7] For example, where a crime is not completed or not discovered, despite diligence on the part of the police, until after the commencement of a prosecution for other crimes arising from the same trans-

join at one trial all the charges against a defendant which grow out of a single criminal act, occurrence, episode, or transaction. This "same transaction" test of "same offence" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience.[8] Modern rules of criminal and civil procedure reflect this recognition. See *UMW* v. *Gibbs*, 383 U. S. 715, 724–726 (1966). Although in 1935 the American Law Institute adopted the "same evidence" test, it has since replaced it with the "same

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action, an exception to the "same transaction" rule should be made to permit a separate prosecution. See, *e. g.*, *Diaz* v. *United States*, 223 U. S. 442, 448–449 (1912). Cf. ALI, Model Penal Code, Proposed Official Draft §§ 1.07 (2), 1.09 (1)(b) (1962); *Connelly* v. *D. P. P.* [1964] A. C. 1254, 1360. Another exception would be necessary if no single court had jurisdiction of all the alleged crimes. An additional exception is discussed in n. 11, *infra*.

[8] Admittedly, the phrase "same transaction" is not self-defining. Guidance for its application can be obtained from cases interpreting the phrase as it is used in the Federal Rules of Criminal Procedure. See in particular cases under Rule 8 (a). Although analogies to the use of the phrase in civil litigation are not perfect since policy considerations differ, some further guidance for its application in the present context can be obtained from the course of its application in civil litigation, where the courts have not encountered great difficulty in reaching sound results in particular cases. See 3 J. Moore, Federal Practice ¶13.13 (1968); 1A W. Barron & A. Holtzoff, Federal Practice & Procedure § 394 (Wright ed. 1960). Additional guidance may be found in cases developing the standard of "common nucleus of operative fact," *UMW* v. *Gibbs*, 383 U. S. 715, 725 (1966), for purposes of pendent jurisdiction. See generally Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 660–662 (1968).

transaction" test.[9] England, too, has abandoned its surviving rules against joinder of charges and has adopted the "same transaction" test.[10] The Federal Rules of Criminal Procedure liberally encourage the joining of parties and charges in a single trial. Rule 8 (a) provides for joinder of charges which are similar in character, or arise from the same transaction or from connected transactions or form part of a common scheme or plan. Rule 8 (b) provides for joinder of defendants. Rule 13 provides for joinder of separate indictments or informations in a single trial where the offenses alleged could have been included in one indictment or information.[11] These rules represent considered modern thought concerning the proper structuring of criminal litigation.

The same thought is reflected in the Federal Rules of Civil Procedure. A pervasive purpose of those Rules is to require or encourage the consolidation of related claims in a single lawsuit. Rule 13 makes compulsory (upon pain of a bar) all counterclaims arising out of

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[9] Compare ALI, Administration of the Criminal Law, Official Draft: Double Jeopardy § 5 (1935) with ALI, Model Penal Code, Proposed Official Draft §§ 1.07 (2), 1.09 (1)(b) (1962). See also Ill. Rev. Stat. c. 38, §§ 3–3, 3–4 (b)(1) (1967).

[10] See *Connelly* v. *D. P. P.*, [1964] A. C. 1254.

[11] Rule 14 provides for separate trials under court order where joinder would be prejudicial to either the prosecution or the defense. Cf. Fed. Rule Civ. Proc. 42. Even where separate trials are permitted to avoid prejudicial joinder, the "same transaction" rule can serve a useful purpose since the defendant is at least informed at one time of all the charges on which he will actually be tried, and can prepare his defense accordingly. Moreover, the decision on whether charges are to be tried jointly or separately will rest with the judge rather than the prosecutor. And separate trials may not be ordered, of course, where the proofs will be repetitious, or the multiplicity of trials vexatious, or where the multiplicity will enable the prosecution to use the experience of the first trial to strengthen its case in a subsequent trial.

the same transaction or occurrence from which the plaintiff's claim arose. Rule 14 extends this compulsion to third-party defendants. Rule 18 permits very broad joinder of claims, counterclaims, cross-claims, and third-party claims. Rules 19, 20, and 24 provide for joinder of parties and intervention by parties having claims related to the subject matter of the action. Rule 23 permits the consolidation of separate claims in a class action; see particularly Rule 23 (b)(3).

In addition, principles of *res judicata* and collateral estoppel caution the civil plaintiff against splitting his case. The doctrine of pendent jurisdiction has furthered single trials of related cases. See *UMW* v. *Gibbs, supra.* Moreover, we have recognized the jurisdiction of three-judge courts to hear statutory claims pendent to the constitutional claim which required their convening. See, *e. g., United States* v. *Georgia Public Service Comm'n,* 371 U. S. 285, 287–288 (1963); *King* v. *Smith,* 392 U. S. 309 (1968).

It is true that these developments have not been of a constitutional dimension, and that many of them are permissive and discretionary rather than mandatory. Flexibility in the rules governing the structure of civil litigation is appropriate in order to give the parties the opporunity to shape their own private lawsuits, provided that injustice, harassment or an undue burden on the courts does not result. Some flexibility in the structuring of criminal litigation is also desirable and consistent with our traditions. But the Double Jeopardy Clause stands as a constitutional barrier against possible tyranny by the overzealous prosecutor. The considerations of justice, economy, and convenience which have propelled the movement for consolidation of civil cases apply with even greater force in the criminal context because of the constitutional principle that no man shall be vexed more than once by trial for the same

offense.[12] Yet, if the Double Jeopardy Clause were interpreted by this Court to incorporate the "same evidence" test, criminal defendants would have less protection from multiple trials than civil defendants. This anomaly would be intolerable. It was condemned by a New Jersey court nearly a century and a half ago in words even more applicable today:

> "If in civil cases, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen, by unnecessary prosecutions . . . . [This] is a case where the state has thought proper to prosecute the offence in its mildest form, and it is better that the residue of the offence go unpunished, than by sustaining a second indictment to sanction a practice which might be rendered an instrument of oppression to the citizen." *State* v. *Cooper*, 13 N. J. L. 361, 375, 376 (1833).

The present case highlights the hazards of abuse of the criminal process inherent in the "same evidence" test and demonstrates the necessity for the "same transaction" test. The robbery of the poker game involved six players—Gladson, Knight, Freeman, Goodwin, McClendon, and Roberts. The robbers also stole a car. Seven separate informations were filed against the petitioner, one covering each of the robbery victims, and the seventh covering the theft of the car. Petitioner's first trial was under the information charging the robbery of Knight. Since Missouri has offered no justification for not trying the other informations at that trial, it is reasonable to infer that the other informations were held in reserve to be tried if the

[12] Joinder of defendants, as distinguished from joinder of offenses, requires separate analysis. For example, joinder of defendants can lead to Sixth Amendment problems. See, *e. g.*, *Bruton* v. *United States*, 391 U. S. 123 (1968).

State failed to obtain a conviction on the charge of robbing Knight. Indeed, the State virtually concedes as much since it argues that the "same evidence" test is consistent with such an exercise of prosecutorial discretion.

Four of the robbery victims testified at the trial. Their testimony conflicted as to whether there were three or four robbers. Gladson testified that he saw four robbers, but could identify only one, a man named Brown. McClendon testified that he saw only three men at any one time during the course of the robbery, and he positively identified Brown, Larson, and Johnson; he also thought he heard petitioner's voice during the robbery, but said he was not sure. Knight thought only three men participated in the robbery, and he could not identify anyone. Roberts said he saw four different men and he identified them as Brown, Larsen, Johnson, and petitioner. Under cross-examination, he conceded that he did not recognize petitioner's voice, he did not see his face or his hands. He maintained that he could identify him by his "size and height" even though all the robbers had worn outsized clothing, and even though he could not connect petitioner with the actions of any of the robbers. On this evidence the jury acquitted petitioner.

At the second trial, for the robbery of Roberts, McClendon was not called as a witness. Gladson, who previously had been able to identify only one man—Brown—now was able to identify three—Brown, Larson, and petitioner. On a number of details his memory was much more vivid than it had been at the first trial. Knight's testimony was substantially the same as at the first trial—he still was unable to identify any of the robbers. Roberts, who previously had identified petitioner only by his size and height, now identified him by his size, actions, voice, and a peculiar movement of

his mouth. As might be expected, this far stronger identification evidence brought a virtually inevitable conviction.

The prosecution plainly organized its case for the second trial to provide the links missing in the chain of identification evidence that was offered at the first trial. McClendon, who was an unhelpful witness at the first trial was not called at the second trial. The hesitant and uncertain evidence of Gladson and Roberts at the first trial became detailed, positive, and expansive at the second trial. One must experience a sense of uneasiness with any double jeopardy standard that would allow the State this second chance to plug up the holes in its case. The constitutional protection against double jeopardy is empty of meaning if the State may make "repeated attempts" to touch up its case by forcing the accused to "run the gantlet" as many times as there are victims of a single episode.

Fortunately for petitioner, the conviction at the second trial can be reversed under the doctrine of collateral estoppel, since the jury at the first trial clearly resolved in his favor the only contested issue at that trial, which was the identification of him as one of the robbers. There is at least doubt whether collateral estoppel would have aided him had the jury been required to resolve additional contested issues on conflicting evidence.[13] But correction of the abuse of criminal process should not in any event be made to depend on the availability of collateral estoppel. Abuse of the criminal process is foremost among the feared evils which led to the inclusion of the Double Jeopardy Clause in the Bill of Rights. That evil will be most effectively avoided, and the Clause can thus best serve its worthy ends, if "same

[13] And, of course, collateral estoppel would not prevent multiple prosecutions when the first trial ends in a verdict of guilty.

offence" is construed to embody the "same transaction" standard. Then both federal and state prosecutors will be prohibited from mounting successive prosecutions for offenses growing out of the same criminal episode, at least in the absence of a showing of unavoidable necessity for succesive prosecutions in the particular case.[14]

[14] The question of separate trials for different crimes committed during a single criminal transaction is entirely distinct from and independent of the question of prosecutorial discretion to select the charges on which a defendant shall be prosecuted; and, as explained in my separate opinion in *Abbate, supra*, at 198–199, it is also distinct from and independent of the question of the imposition of separate punishments for different crimes committed during a single transaction. The Double Jeopardy Clause does not limit the power of Congress and the States to split a single transaction into separate crimes so as to give the prosecution a choice of charges. Cf. *Gore* v. *United States*, 357 U. S. 386, 395 (1958) (DOUGLAS, J., dissenting). Moreover, the clause does not, as a general matter, prohibit the imposition at one trial of cumulative penalties for different crimes committed during one transaction. See my separate opinion in *Abbate, supra*. Thus no crime need go unpunished. However, the clause does provide an outer limit on the power of federal and state courts to impose cumulative punishments for a single criminal transaction. See *Gore* v. *United States, supra*, at 397–398 (BRENNAN, J., dissenting).

SUPREME COURT OF THE UNITED STATES

No. 57.—October Term, 1969

Bob Fred Ashe, Petitioner, v. Harold R. Swenson, Warden. } On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[April 6, 1970]

Mr. Chief Justice Burger, dissenting.

The Fifth Amendment to the Constitution of the United States provides in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Nothing in the language and none of the gloss previously placed on this provision of the Fifth Amendment remotely justifies the treatment which the Court today accords to the collateral estoppel doctrine. Nothing in the purpose of the authors of the Constitution commands or even justifies what the Court decides today; this is truly a case of expanding a sound basic principle beyond the bounds—or needs—of its rational and legitimate objectives to preclude harassment of an accused.

I

Certain facts are not in dispute. The home of John Gladson was the scene of "a friendly game of poker" in the early hours of the morning of January 10, 1960. Six men—Gladson, Knight, Freeman, Goodwin, McClendon and Roberts—were playing cards in the basement. While the game was in progress, three men, armed with a sawed-off shotgun and pistols, broke into the house and forced their way into the basement. They ordered the players to remove their trousers and tied them up, except for Gladson who had a heart condition of which the robbers seemed to be aware. Substantial amounts of currency and checks were taken from the poker table

and items of personal property were taken from the persons of the players. During the same period in which the men were being robbed in the basement, one man entered Mrs. Gladson's bedroom three floors above, ripped out the telephone there, tied her with the telephone cord, and removed the wedding ring from her finger. The robbers then fled in a car belonging to Roberts.

Four men—Ashe, Johnson, Larson, and Brown—were arrested later in the morning of the robbery. Each was subsequently charged in separate informations with the robbery of each of the six victims; Ashe, Johnson, and Larson were also charged with the theft of the car belonging to Roberts.

Ashe went to trial on May 2, 1960, on the charge of robbing Knight. No charge as to other victims was presented. Four of the six men—Knight, Gladson, McClendon, and Roberts—testified about the robbery and described their individual losses. Mrs. Gladson did not testify because she was ill on the day of trial. As MR. JUSTICE BRENNAN has stated, the victims' testimony conflicted as to whether there were three or four robbers:

> "Gladson testified that he saw four robbers, but could identify only one, a man named Brown. McClendon testified that he saw only three men at any one time during the course of the robbery, and he positively identified Brown, Larson, and Johnson; he also thought he heard petitioner's voice during the robbery but said he was not sure. Knight thought only three men participated in the robbery, and he could not identify anyone. Roberts said he saw four different men and he identified them as Brown, Larson, Johnson, and petitioner." *Ante*, at ——.

Ashe put in no evidence whatever, as was his right, and even waived closing arguments to the jury; none-

theless, the jury did not reach a verdict of guilty but returned a somewhat unorthodox verdict of "not guilty due to insufficient evidence."

Then, on June 20, 1960, Ashe was tried for the robbery of Roberts. Mrs. Gladson testified at this trial, relating that she was asleep in her bedroom when one of the robbers entered, awoke her, tied her up with a telephone cord, and took cash and her wedding ring. The robber stayed in her room for about 15 or 20 minutes, during which time she could hear scuffling and talking in the basement. She said that she was able to identify the robber by his voice, and that he was Johnson, not Ashe.

The Court's opinion omits some relevant facts. The other victims' testimony at the second trial corroborated that of Mrs. Gladson that four robbers were present during the time in which the robbery took place. Gladson identified three robbers—Brown, Larson, and Ashe—as having been in the basement for the first minutes of the robbery; also he stated that one or more of the robbers had left the basement after 20 or 25 minutes. Roberts identified Brown, Larson, and Ashe as the men who formed the original group who entered the basement and testified that after the robbery, two of the three men, including Ashe, left the room. Two men returned in a short time with car keys, but Johnson had replaced Ashe as one of the two. There can be no doubt that the record shows four persons in the robbery band. The jury found Ashe guilty of robbing Roberts—the only charge before them.

Thereafter, as described in the opinion of the majority, Ashe's conviction was reviewed and upheld by the Supreme Court of Missouri, the United States District Court for the Western District of Missouri, and the Court of Appeals for the Eighth Circuit; in turn each rejected Ashe's double jeopardy claim.

II

The concept of double jeopardy and our firm constitutional commitment is against repeated trials "for the *same offense.*" This Court, like most American jurisdictions, has expanded that part of the Constitution into a "same evidence" test.[1] For example, in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), it was stated, so far as here relevant, that

> "[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision [*i. e.*, each charge] requires *proof of fact which the other does not.*" (Emphasis added.)

Clearly and beyond dispute the charge against Roberts in the second trial required proof of a fact—robbery of Roberts—which the charge against Knight did not. The Court, therefore, has had to reach out far beyond the accepted offense-defining rule to reach its decision in this case. What it has done is to superimpose on the same-evidence test a new and novel collateral estoppel gloss.

The majority rests its holding in part by relying on a series of cases beginning with *United States* v. *Oppenheimer*, 242 U. S. 85 (1916), which did not involve constitutional double jeopardy but applied collateral estoppel as developed in civil litigation to federal criminal prosecutions as a matter of this Court's supervisory power over the federal court system. The Court now finds the federal collateral estoppel rule to be an "ingredient" of the Fifth Amendment guarantee against double jeopardy and applies it to the States through the Fourteenth Anendment. This is an ingredient which eluded Judges and Justices for nearly two centuries; the

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[1] The test was first enunciated in *The King* v. *Vandercomb & Abbott*, 2 Leach 708, 720, 168 E. R. 455, 461 (Ex. 1796).

Court finds itself endowed with a perception all our predecessors lacked and in an area of the law which encounters no new facts.

The collateral estoppel concept—originally a product only of civil litigation—is a strange mutant as it is transformed to control this criminal case. In civil cases the doctrine was justified as conserving judicial resources as well as those of the parties to the actions and additionally as providing the finality needed to plan for the future. It ordinarily applies to parties on each side of the litigation who have the same interest as or who are identical with the parties in the initial litigation. Here the complainant in the second trial is not the same as in the first even though the State is a party in both cases. Very properly, in criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation. Also, courts which have applied the collateral concept to criminal actions would certainly not apply it to *both* parties, as is true in civil cases, *i. e.*, here, if Ashe had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial.[2]

Perhaps, then, it comes as no surprise to find that the only expressed rationale for the majority's decision is that Ashe has "run the gantlet" once before. This is not a doctrine of the law or legal reasoning but a colorful and graphic phrase, which, as used originally in an opinion of the Court written by MR. JUSTICE BLACK, was intended to mean something entirely different.

[2] If Knight and Roberts had been passengers in a car which collided with one driven by Ashe no one would seriously suggest that a jury verdict for Ashe in an action by Knight against Ashe would bar an action by Roberts against Ashe. To present this situation shows how far the Court here has distorted collateral estoppel beyond its traditional boundaries.

The full phrase is "run the gantlet once *on that charge* . . ." (emphasis added); it is to be found in *Green* v. *United States*, 355 U. S. 184, 190 (1957), where no question of multiple crimes against multiple victims was involved. Green, having been found guilty of second degree murder on a charge of first degree, secured a new trial. This Court held nothing more than that Green, once put in jeopardy—once having "run the gantlet on *that charge*"—of first degree murder, could not be compelled to defend against that charge again on retrial.

Today's step in this area of the constitutional law ought not be taken on no more basis than casual reliance on the "gantlet" phrase lifted out of the context in which it was originally used. This is decision by slogan.

Some commentators have concluded that the harassment inherent in standing trial a second time is a sufficient reason for use of collateral estoppel in criminal trials.[3] If the Court is today relying on a harassment concept to superimpose a new brand of collateral estoppel gloss on the "same evidence" test, there is a short answer; this case does not remotely suggest harassment of an accused who robbed six victims and the harassment aspect does not rise to constitutional levels.[4]

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[3] See, *e. g.*, Mayers and Yarbrough, *Bis Vexari:* New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 29–41 (1960); Comment, 24 Mo. L. Rev. 513 (1959); cf. Note, 75 Yale L. J. 262, 283–292 (1965).

[4] The weight of the harassment factor does not warrant elevating collateral estoppel principles in criminal trials to the level of an "ingredient" of the Fifth and Fourteenth Amendments. True harassment deserves serious consideration because of the strain of the new trial. But society has an urgent interest in protecting the public from criminal acts and we ought not endorse any concepts which put a premium on aggravated criminal conduct in multiple crimes committed on the same evening.

Finally, the majority's opinion tells us

> "that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality." *Ante*, at —.

With deference I am bound to pose the question: what is reasonable and rational about holding that an acquittal of Ashe for robbing Knight bars a trial for robbing Roberts? To borrow a phrase from the Court's opinion what could conceivably be more "hypertechnical and archaic" and more like the stilted formalisms of 17th and 18th century common law England, than to stretch jeopardy for robbing Knight into jeopardy for robbing Roberts?

After examining the facts of this case the Court concludes that the first jury must have concluded that Ashe was not one of the robbers—that he was not present at the time.[5] Also, since the second jury necessarily reached its decision by finding he was present, the collateral estoppel doctrine applies. But the majority's analysis of the facts completely disregards the confusion injected into the case by the robbery of Mrs. Gladson. To me, if we are to psychoanalyze the jury, the evidence adduced at the first trial could more reasonably be construed as indicating that Ashe had been at the Gladson home with the other three men but was not one of those involved in the basement robbery. Certainly, the evidence at the first trial was equivocal as to whether there were three or four robbers, whether the man who robbed

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[5] Arguably if Ashe had made a defense solely by alibi, that he was in Vietnam at the time and offered evidence of Army records etc., one might reasonably say the jury decided what the Court today says it probably decided. On this record however, such an analysis is baseless.

Mrs. Gladson was one of the three who robbed the six male victims, and whether a man other than the three had robbed Mrs. Gladson. Then, since the jury could have thought that the "acting together" instruction given by the trial court in both trials[6] only applied to the actual taking from the six card players, and not to Mrs. Gladson, the jury could well have acquitted Ashe but yet believed that he was present in the Gladson home. On the other hand, the evidence adduced at the second trial resolved issues other than identity which may have troubled the first jury. If believed, that evidence indicated that a fourth robber, Johnson, not Ashe, was with Mrs. Gladson when Ashe, Larson, and Brown were robbing the male victims. Johnson did go to the basement where the male victims were located, but only after the other three had already taken the stolen items and when the robbers were preparing for their departure in a car to be stolen from Roberts.

Accordingly, even the facts in this case, which the Court's opinion considers to "lead to but one conclusion," are susceptible to an interpretation that the first jury did not base its acquittal on the identity ground which the Court finds so compelling. The Court bases its holding on sheer "guesswork,"[7] which should have no place particularly in our review of state convictions by way of habeas corpus. As Mr. Justice Holmes said in *Guy* v. *Donald*, 203 U. S. 399, 406 (1906):

> "As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied. . . ."

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[6] See *ante*, at — n. 3.

[7] For a criticism of the collateral estoppel doctrine because of the "guesswork" necessary to apply it to general criminal verdicts, see Note, 75 Yale L. J. 262, 285 (1965).

III

The essence of MR. JUSTICE BRENNAN'S concurrence is that this was all one transaction, one episode, or, if I may so characterize it, one frolic, and, hence, only one crime. His approach, like that taken by the Court, totally overlooks the significance of there being *six entirely separate charges of robbery* against six individuals.

This "single frolic" concept is not a novel notion; it has been urged in various courts including this Court.[8] One of the theses underlying the "single frolic" notion is that the criminal episode is "indivisible." The short answer to that is that to the victims, the criminal conduct is readily divisible and intensely personal; each offense is an offense against *a person*. For me it demeans the dignity of the human personality and individuality to talk of "a single transaction" in the context of six separate assaults on six individuals.

No court which elevates the individual rights and human dignity of the accused to a high place—as we should—ought to be so casual as to treat the victims as a single homogenized lump of human clay. I would grant the dignity of individual status to the victims as much as to those accused, not more but surely no less.

If it be suggested that multiple crimes can be separately punished but must be collectively tried, one can point to the firm trend in the law to allow severance of defendants and offenses into separate trials so as to avoid possible prejudice of one criminal act or of the conduct of one defendant to "spill over" on another.

What the Court holds today must be related to its impact on crimes more serious than ordinary housebreaking, followed by physical assault on six men and robbery of all of them. To understand its full impact

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[8] *Hoag* v. *New Jersey*, 356 U. S. 464, 473 (Warren, C. J., dissenting), 477 (DOUGLAS, J., dissenting) (1958).

we must view the holding in the context of four men who break and enter, rob and then kill six victims. The concurrence tells us that unless all the crimes are joined in one trial the alleged killers cannot be tried for more than one of the killings even if the evidence is that they personally killed two, three or more of the victims. Or alter the crime to four men breaking into a college dormitory and assaulting six girls. What the Court is holding is, in effect, that the second and third and fourth criminal acts are "free," unless the accused is tried for the multiple crimes in a single trial—something defendants frantically use every legal device to avoid, and often succeed in avoiding. This is the reality of what the Court holds today; it does not make good sense and it cannot make good law.

I therefore join with the four courts which have found no double jeopardy in this case.

To borrow some wise words from MR. JUSTICE BLACK in his dissent in *Jackson* v. *Denno*, 378 U. S. 368, 401, 407–408 (1964), the conviction struck down in this case "is in full accord with all the guarantees of the Federal Constitution and . . . should not be held invalid by this Court because of a belief that the Court can improve on the Constitution."

END OF CASE